Memorandum Opinion, Dimock, J.

(155)

OPINION.

DIMOCK, D. J.

On October 18, 1954, General Stores Corporation, the Debtor, filed a petition in this court under section 322 of the Bankruptcy Act, 11 U. S. C. § 722, proposing an arrangement under Chapter XI of the Act. A stockholder, Max Shlensky, has moved by order to show cause under section 328 of the Act, 11 U. S. C. § 728, for a dismissal of the proceedings unless the petition be amended so as to comply with Chapter X. The Securities and Exchange Commission has moved for leave to intervene and to support a motion which it has filed for the same relief as asked by the stockholder.

The motion of the Securities and Exchange Commission for leave to intervene is granted. Its motion for dismissal of the proceedings unless the petition be amended so as to comply with Chapter X will be considered with that of the stockholder.

The factors which should control the decision of the question have been discussed by the Supreme Court in Securities Comm'n. v. U. S. Realty Co., 310 U. S. 434. There the court stated, page 447, that "the two chapters were specifically devised to afford different procedure, the one adapted to the reorganization of corporations with complicated debt structures and many stockholders, the other to composition of debts of small individual business and corporations with few stockholders". In that case proceedings (156) under Chapter XI were dismissed. The debtor there had outstanding 900,000 shares of stock listed on the New York Stock Exchange and held by 7,000 stockholders. Its assets were listed at about $7,000,000 and its liabilities at about $5,000,000.

In a more recent case the Court of Appeals for this Circuit has declined to interfere with a refusal by the district court to order that proceedings under Chapter XI

be redirected under Chapter X. Matter of Transvision, Inc., —— F. 2d ——. In the Transvision case the debtor had outstanding 385,000 shares of common stock and 1773½ shares of preferred. All were in the hands of management interests except 135,000 shares of common held by 425 investors. It was not listed on any exchange. The debtor's liabilities were about $700,000 and its assets about $1,000,000.

In the instant case the Debtor has outstanding 2,232,429 shares of common stock listed on the American Stock Exchange and held by 7,000 stockholders. It is in part listed with the Securities and Exchange Commission pursuant to the Securities Act of 1933. The Debtor's liabilities are listed at about $4,000,000 and its assets at about $5,000,000.

The proposed arrangement would have compulsory effect only on the unsecured creditors who are entitled to no priority. They would receive 100% of their claims, 20% on confirmation of the plan and 20% annually thereafter.

The Debtor, now known as General Stores Corporation, (157) was formerly D. A. Schulte, Inc. The stock was in part issued pursuant to a plan of reorganization pursuant to section 77B of the Bankruptcy Act which was consummated as of October 31, 1950. The balance was later sold by the debtor at prices ranging from $1.375 to $1.60 per share.

The Debtor was organized in 1915 and throughout most of its history operated a chain of stores for the sale of tobacco and accessory products as well as other sundry items. After the 77B reorganization proceeding and during the war years the Debtor enjoyed a profitable operation due principally to wartime scarcities. In the post-war period, however, the Debtor's volume began to fall. In addition, the Debtor's profit margin, already low with respect to most of its products, became narrower as prices declined and costs rose. Attempts at modernization of existing units failed materially to stem continuing losses.

A sale of the 400,000 shares of common stock in 1951 was accompanied by a change in the management of the enterprise. It was announced at that time that the $600,000 proceeds of the stock sale would be used to convert a number of the existing units to candy or food and drink operations in order to improve profit margins and thus reduce the company's losses. After consummation of the stock sale, however, further studies of the program were made and, upon discovery, that costs of conversion would be too great, the program was abandoned and the proceeds of the sale were used for general corporate purposes. (158) During the four years and five months ended March 31, 1953, the Debtor sustained aggregate losses exceeding $2,700,000. With the continuance of losses in 1953 and 1954[1] the Debtor embarked upon a program of discontinuing the operation of its Schulte-type stores.[2]

In August 1953, the Debtor purchased all of the outstanding capital stock of Stineway Drug Company. Stineway operates a chain of 23 retail stores in the Chicago area engaged in selling drugs, cosmetics, tobacco products, drug sundries, candy and liquor; all but one of the stores also operate fountains and luncheonettes. In addition, Stineway operates a public cafeteria and sells merchandise to 12 independent stores in the Chicago area known as Stineway System Stores. The purchase price of this stock was $1,220,320.50, $800,000 of which was paid by the Debtor at the closing and the balance was to be paid on April 15, 1954. Of the $800,000 down payment $365,000 was ultimately borrowed by the Debtor from Stineway; according to the company's latest prospectus, the Debtor borrowed an aggregate of $870,000 from Stineway to pay part of the purchase price.

[1] For the five years and five months ended March 31, 1954 the Debtor sustained losses exceeding $4,200,000.

[2] At July 21, 1954, 46 such stores were in operation.

Memorandum Opinion, Dimock, J.

Early in 1954 the Debtor contracted to purchase all the capital stock of Ford Hopkins Company. Ford Hopkins is engaged in the operation of a chain of 48 drug stores and three (159) restaurants principally in Chicago as well as elsewhere in Illinois and in Indiana, Iowa and Wisconsin. Ford Hopkins also owns all the stock of Sargent's Drug Store, the operator of five stores in the Chicago area, and supplies approximately 700 grocery chain stores with standard cosmetic items.

The purchase price of the Ford Hopkins stock was $2,800,000, payable $735,000 upon consummation and the balance over a period of years, at 4% interest. The down payment of $735,000 was derived from (1) the proceeds of the sale of 178,500 shares of common stock in May 1954: $245,438; (2) the proceeds of loans, including one from the Debtor's president: $55,000; and (3) the proceeds of a loan from Stineway: $440,000.[3]

To secure the balance of the purchase price, $2,065,000, the Debtor transferred the following collateral to a Trustee: (1) all of the capital stock of Ford Hopkins and Stineway; (2) dividends payable upon Ford Hopkins and Stineway stock; (3) life insurance policies aggregating $1,700,000 upon the life of the Trustee (one of the sellers); (4) the Debtor's rights to commissions payable to it by Ford Hopkins and Stineway under service contracts based generally upon 1% of the respective net sales of Ford Hopkins and Stineway.

After the consummation of the Ford Hopkins purchase, (160) the indebtedness of the Debtor to Stineway was represented by two non-interest bearing notes, in the amount of $225,000 payable December 15, 1954 and in the amount of $1,085,000 payable June 1, 1964.

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[3] Stineway derived this cash from the sale of warehouse inventory to Ford Hopkins. Ford Hopkins in turn was required to borrow $400,000 from a bank in order to pay for the inventory.

Memorandum Opinion, Dimock, J.

In a Chapter X proceeding the Securities and Exchange Commission would have, among others, the following rights, powers, privileges and duties:

A. Section 172, 11 U. S. C. § 572, provides that any plan of reorganization which the judge regards as worthy of consideration must be submitted to the Commission for an advisory report where the scheduled indebtedness of the debtor exceeds $3,000,000.

B. Section 175, 11 U. S. C. § 575, requires that the report of the Commission, if any, filed in the proceedings, or a summary of the report prepared by the Commission, be transmitted to all creditors and stockholders affected by the plan.

C. Section 208, 11 U. S. C. § 608, provides that the Commission must, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in any Chapter X proceeding. It further provides that upon the filing of such notice of appearance, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in the proceeding, and shall be deemed to have intervened in respect of all matters in the proceeding with the same force and effect as if a petition for that purpose (161) had been allowed by the judge, with the exception that the Commission may not appeal or file any petition for appeal in the proceeding.

D. Section 265, 11 U. S. C. § 665, provides that the Commission shall be given notice of all steps taken in connection with any proceeding, and that there shall be transmitted to the Commission copies of prescribed papers filed in the proceeding and of such other papers as the Commission may request or the Court may direct be transmitted to it.

Memorandum Opinion, Dimock, J.

The Securities and Exchange Commission says that thus Chapter X, unlike Chapter XI, provides adequate means for a disinterested analysis of the Debtor's financial condition and the desirability of the continuance of the enterprise as presently constituted or on any other basis, in order to provide the Court, the parties and the creditors and stockholders with a basis for the exercise of an informed judgment as to the fairness and feasibility of reorganization proposals.

I do not think that the stockholders and creditors ought to be left to do this for themselves as they would have to in a Chapter XI proceeding. One of the strongest reasons for creating a body with the powers of the Securities and Exchange Commission was the propensity of those who had a stake in an enterprise to follow blindly the proposals of management.

In the case of Transvision, Inc., with its 475 outside investors, Judge Sugarman exercised his discretion in favor of (162) proceeding under Chapter XI and the Court of Appeals upheld him. I do not feel, however, that the action of the Court of Appeals constrains me to leave this enterprise to treatment adopted in the words of the Supreme Court in the U. S. Realty case, "to composition of debts of small individual business and corporations with few stockholders". It would require a much more complete demonstration than is possible at the threshold of a proceeding to convince me that supervision was unnecessary over the reorganization of a corporation with 7,000 holders of two and a quarter million shares of stock listed on the American Stock Exchange and recently selling at under two dollars a share.

The motion to dismiss unless the Debtor proceeds under Chapter X is granted.

Settle order on notice.

January 24, 1955.

E. J. Dimock,
United States District Judge.

INDEX

	PAGE
Docket Entries	1a
Order Appealed From	3a
Memorandum Opinion, Dimock, J.	6a
Memorandum Denying Motion for Reargument, Dimock, J.	12a
Petition in Proceedings Under Chapter XI	12a
Exhibit A, Annexed to Petition in Proceedings Under Chapter XI	14a
Order of Reference in Proceedings Under Chapter XI	16a
Certificate of Reference Pursuant to Rule XI-10	16a
Order to Show Cause	17a
Petition	18a
Motion for Leave to Intervene by Securities and Exchange Commission	23a
Motion to Dismiss by Securities and Exchange Commission	27a
Affidavit of George Zolotar, in Support of Motion to Dismiss	29a
Affidavit of Leon Singer, in Opposition to Motion to Dismiss	36a
Affidavit of N. Clarkson Earl, Jr., for Denial of Motion to Dismiss	39a
Exhibit "A", Annexed to Foregoing Affidavit	47a
Notice of Motion for Reargument	50a
Memorandum in Support of Motion for Reargument	52a
Affidavit of C. Edward Brown, in Support of Motion for Reargument	66a
Exhibit "A", Annexed to Foregoing Affidavit	70a
Exhibit "B", Annexed to Foregoing Affidavit	72a
Exhibit "C", Annexed to Foregoing Affidavit	76a
Exhibit "D", Annexed to Foregoing Affidavit	79a

	Original	Print
Proceedings in the U.S.C.A. for the Second Circuit	86a	86a
Opinion, Clark, C. J.	87a	86a
Concurring opinion, Frank, J.	91a	90a
Dissenting opinion, Gaiston, J.	92a	90a
Judgment	96a	93a
Clerk's certificate (omitted in printing)	98a	
Order allowing certiorari	100	93a

Exhibit A Annexed to Petition in Proceedings Under Chapter XI.

"General Stores Corporation," Debtor, proposes the following arrangement with its unsecured creditors:

A. Priority Creditors.

All creditors entitled to priority shall be paid in full in accordance with terms that may be arranged between the Debtor and the said priority creditors.

B. Other Unsecured Creditors.

The Debtor proposes that the rights of the other unsecured creditors be modified so as to provide for the payment to that class of creditors of a sum equal to 100% of their respective claims payable 20% upon confirmation of the plan and 20% annually thereafter.

C. Administration Expenses.

All administration expenses and allowances shall be paid in cash by Debtor upon confirmation of the plan or in accordance with terms that may be arranged between the Debtor and the persons to whom said expenses shall be payable.

Dated: New York, New York, October 18, 1954.

GENERAL STORES CORPORATION,

By John W. Coombs,
Vice-President.

Docket Entries.

A

Date	Proceedings
Oct. 18 1954	Filed petition, proposed arrangement, list of creditors, summary of assets and liabilities, etc.—c.s.
Oct. 18 1954	Filed list of ten largest creditors.
Oct. 18 1954	Filed order referring proceedings to Joyce.
Oct. 18 1954	Filed affdt. & order extending time to file schedules, statement of affairs and all other required information to ten days from date of entry hereof—Clancy, J.
Oct. 28 1954	Filed schedules and statement of affairs—c.s.
Oct. 28 1954	Filed affdt. of John W. Combs under Rule XI-2.
Nov. 1 1954	Filed petition and referee's order amending debtor's schedule A-3.
Nov. 10 1954	Filed pet. & show cause order to dismiss Chapter XI proceedings, etc.—Ret. 11/12/54.
Nov. 12 1954	Filed statement of executory contracts—c.s.
Dec. 3 1954	Receiver registered letter #3190 containing claim of Robert L. Eby and dlvd. to Referee.
Jan. 11 1955	Filed referee's certificate pursuant to Rule XI-10.
Jan. 14 1955	Filed copy of claim of City of Pontiax, County of Oakland, State of Michigan for $63.80—dlvd. to referee.
Jan. 25 1955	Filed affdt. & notice of motion of Securities & Exchange Commission to intervene to dismiss petition, refuse confirmation, etc.—(see opinion).
Jan. 25 1955	Filed affdt. of Leon Singer in opposition to motion to dismiss.

Exhibit A Annexed to Petition in Proceedings Under Chapter XI

GENERAL STORES CORPORATION

Summary of Assets and Liabilities

(For the purpose of the following summary, the items are taken as at *AUGUST 31, 1954*, that being the last date at which complete figures are available. By reason of the extensive operations of the Debtor, its books for the fiscal period ending October 2, 1954, have not as yet been closed.)

ASSETS:

Cash on hand, in banks and in transit			$ 104,831.00
Accounts and interest receivable (net)			29,000.00
Notes Receivable			57,000.00
Merchandise Inventories (cost)		Est.	625,000.00
Furniture, fixtures and equipment (net)			177,565.00
Leasehold improvements (net)			82,082.00
Investment in Stireway Drug Co.	$1,254,045.00		
Investment in Ford Hopkins Co.	2,892,688.00		
	4,146,733.00		
Less pledge to secure payment of	2,065,000.00		
Net			2,081,733.00
Various deferred charges consisting of unexpired insurance, prepaid rents, taxes, supplies and miscellaneous			96,918.00
TOTAL ASSETS			$3,254,529.00

LIABILITIES:

Accounts payable—trade	284,140.00
Accrued expenses	251,004.00
Notes payable	1,310,000.00
Tenants' deposits (unsegregated)	4,750.00
TOTAL LIABILITIES	$1,849,894.00

Order of Reference in Proceedings Under Chapter XI.

(20)

WHEREAS, a petition has been filed by the above named debtor in this Court, on the 18th day of October, 1954; for relief under Chapter XI of the Bankruptcy Act, it is Ordered that the said matter be referred to John E. Joyce, Esq., one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required and permitted by said Act; and that the said debtor shall attend before said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said proceedings.

Dated: New York, N. Y., October 18, 1954.

JOHN W. CLANCY,
U. S. D. J.

Certificate of Referee Pursuant to Rule XI-10.

(124)

I do hereby certify the pertinent facts relating to the above arrangement proceedings:

1. Referred October 18, 1954.

2. November 8, 1954. Mailed notice of initial meeting.

3. November 23, 1954. Initial meeting held and adjourned, and further adjourned from time to time, and now set for January 18, 1955.

JOHN E. JOYCE,
Referee in Bankruptcy.

Dated, New York, January 11, 1955.

Docket Entries.

Date	Proceedings
Jan. 25 1955	Filed affdt. of N. Clarkson Earl, Jr. for denial of motion to dismiss.
Jan. 25 1955	Filed Opinion #21658 granting motion to dismiss unless debtor proceeds under Chapter X—Dimock, J.
Feb. 7 1955	Filed notice of motion and statement for reargument for motion heard and decided by opinion filed 1/25/55, etc.—Ret. 2/15/55 in Room 506.
Feb. 24 1955	Memorandum endorsed on notice of motion for reargument filed 2/7/55 denying motion—Settle order on original motion March 1, 1955 at 10:30 A. M.—Dimock, J.
Feb. 24 1955	Filed Exh. & affdt. of C. Edward Brown in support of motion for reargument.
Mar. 7 1955	Filed petition and unsigned order by Otterbourg, Steindler etc.
Mar. 4 1955	Filed notice of appeal of debtor from order of Dimock, J. dismissing proceedings under Chap. XI.—c. sent.
Mar. 4 1955	Filed cost bond—$250.—Nat'l Surety Co. to parties listed in n. a. 3/7/55.
Mar. 7 1955	Filed order dismissing Chapter XI proceeding unless debtor file an amended petition to comply with requirements of Chap. X on or before 3/15/55—Dimock, J.—signed 2/4/55.
Mar. 7 1955	Filed notice of appeal of above order—c.s. Fred. T. Finnegan; Reich, Peller, Guadagno & Caine; and Blumberg, Singer, Heppon & Blumenthal.
Mar. 7 1955	Filed cost bond on appeal—$250—Nat'l. Surety Co.

Order to Show Cause to Dismiss Proceedings Under Chapter XI.

(114)

Upon the annexed petition of Max Seidensky, verified the 28th day of October, 1954, praying for various relief,

Let, General Stores Corporation, Debtor, and Securities and Exchange Commission show cause before me the undersigned Judge or such other Judge as may be sitting in Bankruptcy Part On the 12th day of November, 1954, in Room 506 of the United States Courthouse, Foley Square, New York, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be entered dismissing the proceedings under Chapter XI unless within such time as the Court shall fix, the petition be amended to comply with the requirements of Chapter XI for the filing of a debtor's petition or a creditor's petition under such Chapter;

Let service of a copy of this order, together with the petition upon which it is based, be made upon General Stores Corporation by service upon its attorneys, Otterbourg, Steindler, Houston & Rosen, and upon the Securities and Exchange Commission, by its counsel located in the City of New York, on or before the 10th day of November, 1954, which service shall be deemed sufficient.

Dated: New York, N. Y., November 9th, 1954.

Sylvester J. Ryan,
U. S. D. J.

Order Appealed From.

(203)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

No. 90594.

IN THE MATTER

of

Proceedings for an arrangement under Chapter XI of the Bankruptcy Act of

GENERAL STORES CORPORATION,

Debtor.

At New York, New York, in said District, on the 4th day of February, 1955.

The debtor above named, having filed a petition under Section 322, Chapter XI of the Bankruptcy Act, and a motion having been made by Max Shlensky, a stockholder of the debtor, by order to show cause dated November 9th, 1954, pursuant to Section 328 of the Bankruptcy Act, for an order dismissing the proceedings filed by General Stores Corporation, the debtor, unless within such time as this Court shall fix, the debtor's petition is amended to comply with the requirements of Chapter X for the filing of a debtor's petition or a creditor's petition under such Chapter is filed, and due notice having been given thereof, and the Securities and Exchange Commission having moved this Court for leave to intervene in the said Chapter XI proceeding for the purpose of moving this Court (a) to dismiss the debtor's petition herein, (b) to refuse confirmation of the debtor's arrangement, and (c) to dismiss the

said Chapter XI proceeding unless the debtor's petition be amended or creditor's petition be filed to conform with the provisions of Chapter X, and the Securities and Exchange Commission having also moved this Court for an order dismissing the debtor's petition for relief under Chapter XI of the Bankruptcy Act as amended, and (204) dismissing this proceeding unless the petition be amended to comply with the requirements of Chapter X for the filing of debtor's petition or a creditor's petition under Chapter X be filed, and all motions having duly come on to be heard before this Court on the 2nd day of December, 1954, and Reich, Peller, Guadagno & Caine, Esqs., by A. Alan Reich, of counsel, attorneys for Max Shlensky, appearing and having been heard in support of said motion of Max Shlensky, and George Zolotar, Esq., attorney for the Securities and Exchange Commission, appearing and having been heard in support of the motions of the Securities and Exchange Commission, and Otterbourg, Steindler, Houston & Rosen, Esqs., by Frederic P. Houston of counsel, attorneys for General Stores Corporation, the debtor, appearing and having been heard in opposition to all motions, and Blumberg, Singer, Heppen & Blumenthal, Esqs., attorneys for a creditors' committee therein, having appeared in opposition to all motions, and the Court having filed its opinion dated January 24th, 1955,

Now, upon the order to show cause, signed by the Hon. Sylvester J. Ryan, a Judge of this Court, on the 9th day of November, 1954, and the petition annexed thereto of Max Shlensky, verified the 28th day of October, 1954, submitted in support of the motion of Max Shlensky; the affidavit of N. Clarkson Earl, Jr., sworn to the 26th day of November, 1954, submitted in opposition to the motion of Max Shlensky; the motion for leave to intervene by the Securities and Exchange Commission, dated the 1st day of December, 1954, verified by George Zolotar, Esq., the 1st

Order Appealed From

day of December, 1954, and the motion to dismiss made by the Securities and Exchange Commission dated the 1st day of December, 1954, and the affidavit in support of said motion duly sworn to the 1st day of December, 1954, and the opinion of the Hon. Edward J. Dimock, filed on the 24th day of January, 1955, and it is

(205) ORDERED:

1. The motion by the Securities and Exchange Commission for leave to intervene in this proceeding for the purpose of moving to dismiss the debtor's petition herein to deny confirmation of the proposed Chapter XI proceeding, and to dismiss the arrangement herein, be and the same hereby is granted;

2. The petition of General Stores Corporation for relief under Chapter XI of the Bankruptcy Act and the proceedings under Chapter XI, be and they hereby are dismissed unless on or before March 15, 1955, General Stores Corporation file an amended petition to comply with the requirements of Chapter X for the filing of a debtor's petition or unless on or before such date a creditors' petition under Chapter X be filed.

EDWARD J. DIMOCK,
U. S. D. J.

18. That it would be for the best interests of the stockholders that a trustee be appointed pursuant to the provisions of Chapter X to go forward and develop a plan of reorganization which would be in the best interests of the stockholders in addition to those of general creditors.

(119) 19. That pursuant to decisions of the various Courts, including the Supreme Court of the United States, this matter is improperly brought under Chapter XI.

WHEREFORE, your petitioner respectfully prays that the annexed Order to Show Cause be signed directing the debtor and the Securities and Exchange Commission, or any other party in interest which the Court may designate, to show cause why the order should not be entered dismissing the proceedings under Chapter XI unless within such time as the Court shall fix, the petition be amended to comply with the requirements of Chapter XI for the filing of a debtor's petition or a creditor's petition under such Chapter. For all of which relief no previous application has been made.

Dated: New York, N. Y., October 26, 1954.

MAX SHLENSKY,
Petitioner.

(Verified by Max Shlensky on October 28, 1954.)

Motion for Leave to Intervene by Securities and Exchange Commission.

(125)

Upon all the proceedings heretofore had herein, the Securities and Exchange Commission, by George Zolotar, its attorney, moves for leave to intervene in this proceeding for the purpose of moving this Court on the grounds stated in the motion to dismiss annexed hereto and submitted herewith:

(a) to dismiss the Debtor's petition herein;

(b) to refuse confirmation of the Debtor's arrangement; and

(c) to dismiss this proceeding unless the Debtor's petition be amended, or creditors' petition be filed, to conform to the provisions of Chapter X.

The motion for intervention is based upon the following allegations upon information and belief:

I

On October 18, 1954, the Debtor filed a petition under Section 322 of the Bankruptcy Act, proposing an arrangement under Chapter XI of the Act. By Order to Show Cause, dated November 9, 1954, on the petition of Max Shlensky, a stockholder of the Debtor, verified October 28, 1954, the Debtor and the Securities and (126) Exchange Commission were directed to show cause why an order should not be entered dismissing the proceedings under Chapter XI unless the petition be amended to comply with the requirements of Chapter X for the filing of a debtor's or creditors' petition under such chapter.

Memorandum Denying Motion for Reargument, Dimock, J.

(185a)

Motion denied. Settle order on original motion March 1, 1955, 10:30 A. M.

February 24, 1955.

E. J. DIMOCK,
U. S. D. J.

Petition in Proceedings Under Chapter XI.

(1)

TO THE HONORABLE JUDGE OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK:

The petition of General Stores Corporation, a corporation engaged in the business of selling at retail, tobacco, tobacco products, smokers' accessories and various items of men's and women's wearing apparel, respectfully represents:

1. Your petitioner has not been known by any other name or trade name for the past six years except that prior to February 15, 1954, your petitioner was known by the name of D. A. Schulte, Inc.; that on said 15th day of February, 1954, there was filed in the Office of the Secretary of State of the State of New York, a certificate changing the name of your petitioner from D. A. Schulte, Inc. to General Stores Corporation.

2. Your petitioner is a business corporation organized and existing under the laws of the State of New York and has been and still is domiciled in the State of New York, Southern District of New York, and has its principal place of business at 380 Broadway, in the Borough

Memorandum Denying Motion for Reargument.
Dimock, J.

of Manhattan, City and State of New York, said has its principal place of business in the Borough of Manhattan, City and State of New York within the said judicial district for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

3. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

4. Your petitioner is unable to pay its debts as they mature, and proposes the arrangement with its unsecured creditors (2) as set forth in Exhibit A hereto annexed and made part hereof.

5. With this petition, petitioner files a list of its creditors and their addresses and a summary of its assets and liabilities in accordance with Section 324(1) of the Bankruptcy Act and is simultaneously applying to the court for an order granting petitioner further time, not exceeding ten (10) days, for the filing of the statement of executory contracts and the schedules and statement of affairs, all in accordance with Section 324(1) of the said Act.

WHEREFORE, your petitioner prays that upon this petition, proceedings may be had in accordance with the provisions of Chapter XI of the Act of Congress relating to bankruptcy.

GENERAL STORES CORPORATION,

By JOHN W. COMBS,
Vice-President.

OTTERBOURG, STEINDLER, HOUSTON & ROSEN,
Attorneys for Debtor,

By MARKS F. PASKE,
Partner.

Petition.

(115)

The petition of M. Shlensky respectfully shows this Court and alleges:

1. That your petitioner has his place of business at 190 West Monroe Street, City of Chicago, State of Illinois, and is the owner of three thousand (3,000) shares of the common stock of the above named debtor, having acquired said stock within a period of approximately three (3) years preceding the filing of a petition for arrangement herein and all of said stock having been acquired by him more than one (1) year from the date of the filing of said petition.

2. That on October 18, 1954, the debtor filed a petition for an arrangement with the Clerk of this Court alleging that it is engaged in the sale of tobacco, smokers' supplies and men's and women's apparel, having its principal place of business at 380 Broadway. No schedules were filed with said petition.

3. That said debtor formerly was known as D. A. Schulte, Inc. until February 15, 1954 at which time the name of said corporation was changed to the present name.

4. Debtor listed assets of $3,254,529.00 which consisted of the following items:

(116) ASSETS:

Cash on Hand	$ 104,831.00
Accounts Receivable	29,000.00
Notes Receivable	57,000.00
Merchandise Inventory (Cost)	625,000.00
Furniture, Fixtures & Equipment	177,965.00
Leasehold Improvements	82,082.00
Investments—Stineway Drug & Ford Hopkins	2,081,733.00
Insurance, Rents, Taxes, etc.	96,918.00
TOTAL ASSETS	$3,254,529.00

The debtor also listed liabilities of $1,649,894.00 which was composed of the following items:

LIABILITIES:

Accounts Payable	$ 284,140.00
Acc. Exp.	251,304.00
Notes Payable	1,310,000.00
Tenants' Deposits	4,750.00
TOTAL LIABILITIES	$1,649,894.00

5. That the arrangement proposed by this debtor provided for payment to unsecured creditors of 20% on confirmation and 20%, annually, thereafter until the full amount of their claims are paid.

6. Upon information and belief, debtor has also expressed a desire to discontinue operation of the Schulte type stores and to ultimately confine its operations to the chain drug field.

7. That as of March 31, 1954, the following balance sheet was issued by the debtor showing a surplus of assets over liabilities, excluding capital stock of $872,954.00. The balance sheet is as follows:

(117) ASSETS:

Cash	$ 412,445
Receivables	24,782
Inventory	1,431,814
TOTAL CURRENT ASSETS	$1,868,811
Leasehold Improvements (Net)	116,988
Fixed Assets	227,732
Leaseholds & Trademarks	2
Dividend Stineway	1,254,045
Inv. & Adv. to Schulco Co., Inc.	1
Deferred Charges	103,714
TOTAL ASSETS	$3,571,293

LIABILITIES:

Due Stineway Drugs Co..	$ 312,778
Due former stockholders of Stineway (since paid)	— 420,321
Accounts Payable	808,017
Accrued Expenses	50,172
Accrued Taxes	64,487
Other Current Liabilities & Accruals	99,372
TOTAL CURRENT LIABILITIES	$1,755,147
Due Steinway	282,500
Tenants' Deposits	5,690
Reserve for Expected Losses and Expense on Elimination of Schulte-type stores	655,000
Common Stock	2,053,922
Capital Surplus	1,355,512
Earned Surplus Deficit	2,536,478
TOTAL LIABILITIES	$3,571,293

8. That this debtor had common stock of $2,053,922; capital surplus of $1,355,512; and surplus deficit of $2,536,478. It is apparent that the principal assets of the debtor consisted of investments in Stineway Drug Co. and Ford Hopkins Co.

9. That the Stineway Drug Company, Inc., upon information and belief, was incorporated in 1937 under the Delaware laws and operates a chain of nineteen (19) drug stores and one cafeteria, all located in Chicago, Illinois.

10. That upon information and belief, the Ford Hopkins Company, Inc. was incorporated under the Delaware laws in July, 1930 and operates a chain of forty-eight (48) (118) drug stores principally in Chicago, Illinois.

11. Upon information and belief, both the capital stock of Stineway Drug Company, Inc. and Ford Hopkins Company, Inc. were purchased by this debtor within the past year when the financial condition of said debtor was exceedingly tight.

12. That substantial losses have been sustained during recent years to the detriment of stockholders.

13. That this corporation was organized under the laws of the State of New York in 1915 and filed a petition for reorganization under Section 77b of the Bankruptcy Act in 1936 and a plan of arrangement consummated in 1940.

14. That upon information and belief, the authorized capital stock of this corporation was 2,315,000 shares of common stock at $1.00 par value and subsequent to October 31, 1953, was increased to 3,000,000 shares. There is presently outstanding, upon information and belief, 2,053,922 shares.

15. That said stock of the corporation has been and is being actively traded on the American Stock Exchange.

16. That in view of the complicated operations of this debtor, including its capital structure, and the fact that the stock is being traded amongst the public, it is important that a complete and full investigation of the activities of this corporation be conducted by a responsible governmental body as well as by a designee of the Court.

17. That in view of the acquisition of the two subsidiaries previously referred to the funded obligation running into considerable amounts has been created in favor of the two subsidiaries.

Motion for Leave to Intervene by Securities and Exchange Commission.

II

The Debtor, a New York corporation, has outstanding in the hands of the public 2,232,422 shares of $1 Par Value common stock. The stock is listed upon the American Stock Exchange.

Incorporated herein by reference with the same effect as if fully set forth herein is the affidavit of George Zolotar, verified December 1, 1954, annexed to the Commission's Motion to Dismiss filed herewith.

III

The Securities and Exchange Commission (the Commission) is an agency of the United States, created pursuant to Sec. 4(a) of the Securities and Exchange Act of 1934, as amended. Under the provisions of the Bankruptcy Act of 1898, as amended, the Commission is charged with certain duties and vested with certain rights, powers and privileges for the purpose of enabling it to protect and represent investors and the general public in connection with the reorganization of corporations under Chapter X of that Act. These include the duty to maintain and preserve the public policy expressed in the Bankruptcy Act, as amended, and to forestall the impairment of its functions under Chapter X by improper resort to Chapter XI proceedings.

IV

Among the rights, powers, privileges and duties of the Commission under Chapter X of the Bankruptcy Act, as amended, are the following:

Motion for Leave to Intervene by Securities and Exchange Commission.

(127) A. Section 172 provides that any plan of reorganization which the judge regards as worthy of consideration must be submitted to the Commission for an advisory report where the scheduled indebtedness of the debtor exceeds $3,000,000.

B. Section 175 requires that the report of the Commission, if any, filed in the proceedings, or a summary of the report prepared by the Commission, be transmitted to all creditors and stockholders affected by the plan.

C. Section 208 provides that the Commission must, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in any Chapter X proceeding. It further provides that upon the filing of such notice of appearance, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in the proceeding, and shall be deemed to have intervened in respect of all matters in the proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge, with the exception that the Commission may not appeal or file any petition for appeal in the proceeding.

D. Section 265 provides that the Commission shall be given notice of all steps taken in connection with any proceeding, and that there shall be transmitted to the Commission copies of prescribed papers filed in the proceeding and of such other papers as the Commission may request or the Court may direct be transmitted to it.

V

The Commission represents that the petition of the Debtor has been improperly filed under Chapter XI of the Bankruptcy Act, on the grounds that Chapter XI is not

available for a corporation with publicly held securities, and that if such a corporation desires (128) to adjust its obligations under the provisions of the Bankruptcy Act, it must seek relief under Chapter X of that Act.

VI

The Commission further represents that the proposed arrangement fails to comply with Section 366 of the Bankruptcy Act in that its proposal under Chapter XI is not in good faith, and that the proposed arrangement should not receive the confirmation of this Court.

VII

If the proposed arrangement is confirmed and the proceedings are not dismissed, the interests of investors in this proceeding will be improperly affected. The Commission will be denied the rights, powers and privileges conferred on it by Chapter X and it will be prevented from performing its duties under that Chapter.

VIII

The Commission's interests and the interests of the investing public, as aforesaid, are not represented by any party to this proceeding. The financial history and condition of this Debtor demonstrate the need for such representation. The adequate representation of these interests requires that the Commission be permitted to intervene for the purpose of taking all such steps as may be appropriate for their protection in this proceeding.

WHEREFORE, the Commission respectfully prays for an order granting it leave to intervene in this proceeding for the purpose of moving this Court (a) to dismiss the Debtor's petition (129) herein, (b) to refuse confirmation of the Debtor's arrangement, and (c) to dismiss this proceeding, unless, within such time as may be fixed by this Court, the petition is amended to comply with the requirement of Chapter X for the filing of a Debtor's petition or creditors' petition under Chapter X is filed; and for such other and further relief as to this Court may seem just and proper in the premises.

Dated: New York, N. Y., December 1, 1954.

GEORGE ZOLOTAR,
Attorney for
Securities and Exchange Commission,
42 Broadway,
New York 4, N. Y.

(Verified by George Zolotar on December 1, 1954.)

Motion to Dismiss by Securities and Exchange Commission.

(131)

Upon the annexed affidavit of George Zolotar, its attorney, and all the proceedings had herein, the Securities and Exchange Commission moves to dismiss the Debtor's petition on the grounds that the petition was not properly filed under Section 322 because the provisions of Chapter XI of the Bankruptcy Act do not apply to a debtor corporation which has securities outstanding in the hands of the public.

Motion to Dismiss by Securities and Exchange Commission.

The Securities and Exchange Commission further moves that the Court dismiss this proceeding on the grounds that the proposed arrangement cannot properly be confirmed and the proceedings may therefore be dismissed because, for the reasons set forth in the preceding paragraph, in the annexed affidavit of George Zolotar, and in the accompanying Motion for Leave to Intervene, the proposed arrangement has not been made in good faith, as required by Section 366.

WHEREFORE, the Securities and Exchange Commission respectfully prays for an order (a) dismissing the Debtor's petition for relief under Chapter XI of the Bankruptcy Act, (132) as amended, and (b) dismissing this proceeding, unless the petition is amended to comply with the requirements of Chapter X for the filing of a debtor's petition, or a creditors' petition under Chapter X is filed, and for such other and further relief as to this Court may seem just and proper in the premises.

Dated: New York, N. Y., December 1, 1954.

GEORGE ZOLOTAR,
Attorney for
Securities and Exchange Commission,
42 Broadway,
New York 4, N. Y.

Affidavit of George Zolotar, in Support of Motion to Dismiss.

(133)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

GEORGE ZOLOTAR, being duly sworn, deposes and says:

I am Attorney for the Securities and Exchange Commission.

I make this affidavit on information and belief in support of motion of Securities and Exchange Commission to dismiss the Debtor's petition for an arrangement with creditors and to dismiss these proceedings. The sources of my information and the grounds for my belief are documents filed in this proceeding, records and documents filed with the Securities and Exchange Commission, and investigations made by members of the staff of the Securities and Exchange Commission.

I

On October 18, 1954 General Stores Corporation, the Debtor, filed a petition in this Court under Section 322 of the Bankruptcy Act proposing an arrangement under Chapter XI of the Act.

(134) By order to show cause, dated November 9, 1954, on the petition of Max Shlensky, a stockholder of the Debtor, verified October 28, 1954, the Debtor and the Commission were directed to show cause why an order should not be entered dismissing the proceedings under Chapter XI unless the petition be amended to comply with the requirements of Chapter X for the filing of a debtor's or creditors' petition under such chapter. Upon the hearing of the order to show cause on November 26, 1954, the matter was adjourned to December 2, 1954 with a direction to the Commission to be ready to proceed at that time. These papers have been prepared within the limited period thus allowed.

Affidavit of George Zolotar.

II

The Debtor, successor by change of name to D. A. Schulte, Inc., has outstanding 2,232,422 shares of its $1 par value common stock held in substantial part by upwards of 7,000 stockholders. The common stock is listed on the American Stock Exchange and is in part registered with the Securities and Exchange Commission pursuant to the Securities Act of 1933.

The Debtor's common stock was initially issued in connection with the promulgation of a plan of reorganization pursuant to Section 77B of the Bankruptcy Act, which plan was dated as of June 1, 1938 and consummated as of the close of business on October 31, 1940. At consummation there were authorized 2,250,000 shares of common stock, of which 667,807.01 shares were issuable under the plan, 1,458,886.25 shares were reserved for conversion of an issue of 58,355.45 shares of $25 preferred stock and 75,000 shares were reserved for issuance to officers and employees. (135) By October 31, 1951 all the preferred shares had been retired or converted and there were outstanding 1,457,843 shares of common stock. In July 1951 Frederick Lewisohn, on behalf of himself and eight associates, made an offer to the company to purchase from it for investment 400,000 shares of common stock at $1.50 per share. The offer was conditioned upon the granting of successive options; the first to purchase 196,079 shares at $1.60 per share within 18 months and the second, dependent upon exercise of the first, to purchase 196,078 shares at $1.70 per share within 36 months. Pursuant to action of the stockholders and the Board of Directors, the transaction was consummated on November 7, 1951 by the sale of 400,000 shares for $600,000 and the delivery of the options expiring respectively on May 7, 1953 and November 7, 1954. Thereafter, such shares and options were resold and reallocated to other persons for investment.

Affidavit of George Zolotar.

In November 1952 the Debtor registered with the Securities and Exchange Commission 741,657 shares of its common stock, representing 50,500 shares less than the aggregate of the shares sold and optioned in 1951. The registration was on behalf of the transferees of the shares and options and was designed to enable the transferees to sell their shares on the Exchange, a condition upon which the transferees insisted prior to exercising the option expiring May 7, 1953. The option was exercised and the registration statement, dated November 12, 1952, has been periodically revised, the last revision being dated July 21, 1954. At that date, it appeared that 404,769 shares had been sold pursuant to the registration statement.

(136) On May 19, 1954, when 2,053,922 shares were outstanding, the Debtor sold an additional 178,500 shares of its common stock to a group of 19 persons at the price of $1.375 per share to be held by them for investment. At that time the Debtor announced its intention to offer for sale not more than 121,500 additional shares of common stock to a group of about 10 persons, also to be held for investment. Thus, it appears that the Debtor had outstanding 2,232,422 shares of its $1 par common stock at July 21, 1954.

III

The Debtor was organized in 1915 and throughout most of its history operated a chain of stores for the sale of tobacco and accessory products as well as other sundry items. After the 77B reorganization proceeding and during the war years the Debtor enjoyed a profitable operation due principally to wartime scarcities. In the postwar period, however, the Debtor's volume began to fall. In addition, the Debtor's profit margin, already low with respect to most of its products, became narrower as prices declined and costs rose. Attempts at modernization of existing units failed materially to stem continuing losses.

Affidavit of George Zalotar.

The sale of the 400,000 shares of common stock in 1951 was accompanied by a change in the management of the enterprise. It was announced at that time that the $600,000 proceeds of the stock sale would be used to convert a number of the existing units to candy or food and drink operations in order to improve profit margins and thus reduce the company's losses. After consummation of the stock sale, however, further studies of the program were made and, upon discovery that costs of conversion would be too great, the program was abandoned and the proceeds of the (137) sale were used for general corporate purposes. During the four years and five months ended March 31, 1953 the Debtor sustained aggregate losses exceeding $2,700,000. With the continuance of losses in 1953 and 1954[1] the Debtor embarked upon a program of discontinuing the operation of its Schulte-type stores.[2]

In August 1953, the Debtor purchased all of the outstanding capital stock of Stineway Drug Company. Stineway operates a chain of 23 retail stores in the Chicago area engaged in selling drugs, cosmetics, tobacco products, drug sundries, candy and liquor; all but one of the stores also operate fountains and luncheonettes. In addition, Stineway operates a public cafeteria and sells merchandise to 12 independent stores in the Chicago area known as Stineway System Stores. The purchase price of this stock was $1,220,320.50, $800,000 of which was paid by the Debtor at the closing and the balance was to be paid on April 15, 1954. Of the $800,000 down payment, $365,000 was ultimately borrowed by the Debtor from Stineway; according to the company's latest prospectus, the Debtor borrowed an aggregate of $870,000 from Stineway to pay part of the purchase price.

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[1] For the five years and five months ended March 31, 1954 the Debtor sustained losses exceeding $4,200,000.

[2] At July 21, 1954, 146 such stores were in operation.

IV

Early in 1954 the Debtor contracted to purchase all the capital stock of Ford Hopkins Company. Ford Hopkins is engaged in the operation of a chain of 38 drug stores and three restaurants principally in Chicago (138) as well as elsewhere in Illinois and in Indiana, Iowa and Wisconsin. Ford Hopkins also owns all the stock of Sargent's Drug Store, the operator of five stores in the Chicago area, and supplies approximately 700 grocery chain stores with standard cosmetic items.

The purchase price of the Ford Hopkins stock was $2,800,000, payable $735,000 upon consummation and the balance over a period of years, at 4% interest. The down payment of $735,000 was derived from (1) the proceeds of the sale of 178,700 shares of common stock in May 1954: $245,438; (2) the proceeds of loans, including one from the Debtor's president: $55,000; and (3) the proceeds of a loan from Stineway: $440,000.*

To secure the balance of the purchase price, $2,065,000, the Debtor transferred the following collateral to a Trustee: (1) all of the capital stock of Ford Hopkins and Stineway; (2) dividends payable upon Ford Hopkins and Stineway stock; (3) life insurance policies aggregating $1,700,000 upon the life of the Trustee (one of the sellers); (4) the Debtor's rights to commissions payable to it by Ford Hopkins and Stineway under service contracts based generally upon 1% of the respective net sales of Ford Hopkins and Stineway.

After the consummation of the Ford Hopkins purchase, the indebtedness of the Debtor to Stineway was represented by two non-interest bearing notes, in the amount of

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* Stineway derived this cash from the sale of warehouse inventory to Ford Hopkins. Ford Hopkins in turn was required to borrow $400,000 from a bank in order to pay for the inventory.

$225,000 payable December 15, 1954 and in the amount of $1,085,000 payable June 1, 1964. It should be noted that (139) whereas in connection with the purchase of Stineway in August 1953, the net worth of Stineway was estimated at about $1,400,000, in connection with the purchase of Ford Hopkins the Stineway net worth, exclusive of the $1,085,000 note payable by the Debtor in 1964, was estimated at $500,000.

V

The plan of arrangement proposed by the Debtor provides for the payment of priority and administration creditors in accordance with such terms as may be arranged between the Debtor and such creditors. Unsecured creditors are to receive 100% of their respective claims payable 20% upon confirmation of the plan and 20% annually thereafter.

The summary of the assets and liabilities as taken from the Debtor's schedules is as follows:

ASSETS

Deposits of money in banks and elsewhere		$ 182,006.58*
Debts due on open accounts		41,324.74
Notes receivable		26,357.36
Stock in trade		400,000.00*
Furniture and Fixtures		125,000.00*
Investment in:		
Stineway Drug Company	$1,254,045.00	
Ford Hopkins Company	2,892,688.00	4,146,733.00
Leasehold		Undetermined
Total		$4,921,421.68

* Estimated Books and records Attorney's fees $15,000.00

Affidavit of George Zolotar.

Debts

Wages (priority)	$ 440.47
Taxes due United States, states and local authorities	Undetermined
Notes Payable:	
Secured	2,065,000.00
Unsecured	1,310,000.00
Other unsecured claims	524,970.09
Total	$3,900,410.56

VI.

(140) In view of the Debtor's financial history and condition, the interests of the Debtor's large class of public stockholders require an intensive and disinterested investigation such as is available under Chapter X into the acts and conduct of the Debtor and its officers, its financial condition, the operation of the business and the desirability of its continuance.

After incurring substantial losses over a period of years, the Debtor's management determined to liquidate and discontinue operation of the Schulte-type stores at an estimated loss of $655,000. Largely with borrowed monies, the proceeds of sale of additional stock to persons close to management, and the syphoning off of cash from purchased companies, it has acquired ownership of two drug chains operating in the Chicago area. Thus, within a brief space of time, a complete changeover of the Debtor's business has taken place; from the direct operations of a chain of stores located principally in the eastern portion of the United States, the Debtor has become a holding company of two drug chains operating in the midwestern portion of the United States.

Unlike Chapter XI, Chapter X provides adequate means for a disinterested analysis of the Debtor's financial condition, the desirability of the continuance of the enterprise as presently constituted or on any other basis, in order to provide the Court, the parties and the creditors and stockholders with a basis for the (141) exercise of an informed judgment as to the fairness and feasibility of reorganization proposals.

(Sworn to by George Zolotar on December 1, 1954.)

Affidavit of Leon Singer, in Opposition to Motion to Dismiss.

(142)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LEON SINGER, being duly sworn, deposes and says that he is an attorney at law and a member of the firm of Blumberg, Singer, Heppen & Blumenthal with offices at 350 Fifth Avenue, New York, N. Y.

Deponent's firm represents a large and substantial number of the unsecured creditors in this matter, approximating $150,000, and in behalf of which creditors they nominated a creditors' committee who were at the first meeting of creditors of the debtor on November 23, 1954, duly elected as such.

A meeting of such Committee will shortly be held at the office of your deponent's firm for the purpose of designating counsel, checking into the affairs of the debtor, examining the proposed plan for arrangement of the debtor, and making of such recommendations as they conclude.

Affidavit of Leon Singer.

On behalf of the creditors and the creditors' committee we appear in opposition to the motion to dismiss the proceedings under Chapter XI and for an amendment of the petition so as to comply with the requirements of Chapter X.

(143) The debtor company has for many years conducted a chain of retail units principally selling tobacco products, and more recently has acquired the entire capital stock of two chains in the Middle West known as the Steinway Drug Company, consisting principally of drug stores and cafeterias and the Ford Hopkins Company, consisting principally of drug stores. At the date of the filing of the Chapter XI proceedings, the aggregate assets of the Debtor as far as your deponent has been able to ascertain are approximately $3,500,000 and the liabilities approximately $1,700,000. The principal asset of the Debtor consists of its equity in the capital stock of the said Steinway Drug Company and Ford Hopkins Company of approximately $2,000,000, being that portion of the purchase price paid on account of the total purchase price paid for said stock of $4,000,000. Accordingly, at the date of the filing of petition in this proceeding there was a balance due and owing of approximately $2,000,000 on the purchase price, which sum is due to be paid in various installments under purchase agreement and trust indenture pursuant to which the entire capital stock of both said companies was deposited as security for the payment of said unmatured balance of purchase price. Deponent is informed that under said purchase agreement and trust indenture the filing of a petition in bankruptcy, or for an arrangement under Chapter X, or a petition for reorganization under Chapter XI, is an event of default and that the debtor has obtained from the Trustee and the Seller, before the filing of the within petition, a waiver as to a default by the filing of within petition for an arrangement but limited to a period not to exceed six months.

This is stated at the outset to point out to this court that if there is to be a reorganization and these (144) proceedings amended to a Chapter X proceeding, that will constitute an event of a default under said purchase agreement and trust indenture, unless the Seller and the Trustee therein waive such default, as to which there is no assurance, thereby causing the loss of the most valuable asset of the Debtor, without which the Debtor company would be hopelessly insolvent.

The vast majority of the unsecured creditors of the Debtor are trades people, most of whom have been selling tobacco products to the Debtor company for many years. They have been asked to and in many instances have agreed to continue to sell to the Debtor during the pendency of these proceedings, in the expectation that the Debtor will be able promptly to make a satisfactory arrangement with its creditors. Under the plan for arrangement herein the Debtor indicated its desire to pay creditors in full over a period of years and accordingly seeks the consent to the extension of the time for payment by said creditors. If such consent were to be procured, nothing is contemplated by this proceeding which would change the stockholders' relative rights or subordinate their interest in any way different from what which now exists.

In your deponent's opinion the purpose and intent of Chapter XI was to make adequate provision for just the type of arrangement as is here contemplated by the Debtor, for under the proceedings sanctioned by this section the difficulties of this Debtor company could be expeditiously disposed of without undue complication, delay or expenditure. Moreover, it would appear to deponent, because of the simplicity of the stock set-up of the Debtor and the non-complexity of its debt structure, entire and adequate (145) relief is obtainable by the Debtor under a Chapter XI proceeding.

On the other hand, were this proceeding to find its way into Chapter X, with the attendant delay and complications, there is every reason to believe that the support of the creditors which is so necessary for the continued operations of the Debtor would be lost. There does not appear to be any cogent reason in the moving papers offered as a reason for this transfer. To say that because the Debtor company is listed on a public Stock Exchange makes this a case for Chapter X is, of course, without any foundation and fact. It is respectfully submitted that the recent "Transvision" case decided by the Court of Appeals of this Circuit (to which reference will be made in an oral argument) is a complete answer, particularly in view of the consent of the Debtor to permit the intervention of the Securities and Exchange Commission in this proceeding, in which your deponent on behalf of his creditors is prepared to join.

Because of all of the foregoing, deponent respectfully prays for the denial of this motion.

(Sworn to by Leon Singer on November 30, 1954.)

Affidavit of N. Clarkson Earl, Jr., for Denial of Motion to Dismiss.

(146)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

N. CLARKSON EARL, JR., being duly sworn, deposes and says:

1. I am President, Director and Stockholder of General Stores Corp., the above named debtor, and submit this affidavit in opposition to the motion made by Max Schlensky

to dismiss the Chapter XI proceedings initiated by the debtor.

2. The Chapter XI proceedings were initiated by the debtor pursuant to Section 322 of the Bankruptcy Act by the filing of a petition on October 18, 1954. With its petition, the debtor proposed the following plan of arrangement with its general unsecured creditors:

A. Priority Creditors.

All creditors entitled to priority shall be paid in full in accordance with terms that may be arranged between the Debtor and the said priority creditors.

B. Other Unsecured Creditors.

The Debtor proposes that the rights of the other unsecured creditors be modified so as to provide for the payment to that class of creditors of a sum equal to 100% of their respective claims payable 20% upon confirmation of the plan and 20% annually thereafter.

C. Administration Expenses.

All administration expenses and allowances shall be paid in cash by Debtor upon confirmation of the plan or in accordance with terms that may be arranged between the Debtor and the persons to whom said expenses shall be payable.

(147) 3. At the time of the filing of the petition, an order was granted by Judge John W. Clancy extending for ten days the time for the filing of schedules, statement of affairs and executory contracts pursuant to Section 324 of the Act. On October 28, 1954, pursuant to said order, the debtor filed in these proceedings its schedules and state-

ment of affairs. The following is a summary of the assets and liabilities of the debtor as furnished to creditors with the referee's notice calling the first meeting of creditors:

Debts		
Wages (priority)		$ 440.47
Taxes due United States, states and local authorities		Undetermined
Notes Payable:		
Secured		2,065,000.00
Unsecured		1,310,000.00
Other unsecured claims		524,970.09
Total		$3,900,410.56
Assets		
Deposits of money in banks and elsewhere		$ 182,006.58
Debts due on open accounts		41,324.74
Notes receivable		26,357.36
Stock in trade		400,000.00
Furniture and Fixtures		125,000.00
Investment in:		
Stineway Drug Company	$1,254,045.00	
Ford-Hopkins Company	2,892,688.00	4,146,733.00
Leaseholds		Undetermined
		$4,921,421.68

(148) 4. On October 19, 1954, Hon. John E. Joyce, the referee in bankruptcy to whom the proceedings were referred, granted an order continuing the debtor in possession of its property and authorizing it to continue the operations of its business. The debtor has, as a debtor in possession, continued those operations. No indemnity has been required of the debtor as a condition to its authority to continue such operations.

5. The debtor is a New York corporation and prior to February 15, 1954 was known as D. A. Schulte, Inc. For many years prior to the filing of the petition, the debtor operated a chain of retail stores in the City of New York and in many other cities in the United States in which stores the debtor sold at retail, tobacco, tobacco products, smokers' supplies and accessories and sundry articles of wearing apparel, accessories, candy and confectionery items. At the time of the filing of the petition, the debtor was operating 76 stores.

6. The creditors affected by the debtor's plan of arrangement are solely its general unsecured creditors and the plan proposes an extension of time to pay these creditors. The debtor's general unsecured obligations may generally be divided into two categories: (a) Those owing for merchandise, services, supplies, rents and salaries shown in the summary to aggregate $524,970.09; and (b) those owing on notes payable to Stineway Drug Company, the debtor's wholly owned subsidiary, aggregating $1,310,000.00.

7. The debtor has no funded debts by way of debentures, certificates of indebtedness of any kind, bonds, mortgages, notes or obligations of like character sold, distributed or in the hands of the general public.

(149) 8. No secured obligation and no securities of any kind are affected by or intended to be modified in any manner or form by the proposed plan. The secured notes of $2,065,000.00 referred to in the above summary, consist of two notes of the debtor, one in the principal sum of $1,605,913.87 payable to the order of Lewis J. Ruskin, and the other in the principal sum of $459,086.13 payable to the order of Rexall Drug Company. These two notes represent the unpaid balance of the purchase price for the capital stock of Ford-Hopkins Company (which by said purchase became a wholly owned subsidiary). These two notes are secured by the deposit of the capital stock of the debtor's two wholly owned subsidiaries above mentioned.

9. The proposed plan does not affect nor seek to modify in any manner or form the capital stock of the debtor. Contrary to the allegations of the petitioner on this motion, the debtor's capital structure is not a complicated one. In fact, it is the simplest one possible. It consists of an authorized capital stock of 3,000,000 shares of common stock of the par value of $1.00 each, and there is issued and outstanding at this time 2,053,922 shares. There is no preferred stock issued or authorized nor is there more than one class of stock.

10. The debtor has been advised by its counsel that it can obtain full and adequate relief under Chapter XI of the Act, since it desires merely to obtain an adjustment of its obligations to its general unsecured creditors. It has been further advised by its counsel that in view of the fact that full and adequate relief can be obtained under Chapter XI, a petition, if originally filed under Chapter X, would have been dismissed by the court as not being filed in good faith pursuant to the provisions of Sections 130 and 146 (2) of the Act.

(150) 11. The plan proposed by the debtor in the Chapter XI proceedings will benefit the interests of stockholders since it is designed to adjust the obligations owing to general unsecured creditors. Since it is not proposed to change, modify, or affect in any manner the rights, powers and privileges of the stockholders or to amend or modify in any respect any of its secured obligations (which consist only in the two secured notes above mentioned), proceedings under Chapter X would have no purpose and no objective whatsoever except to impose upon the estate unnecessary costs, expenses, and harmful delays.

12. Reference has been made to the purchase by the debtor of the stock of Stineway Drug Company and of Ford Hopkins Company, and the Movant, by innuendo, has suggested possible irregularities therein. The purchase of the stock of these valuable drug-store chains in the Middle West was made by the debtor on notice to, and with full approval of its stockholders. Attached hereto, marked Exhibit A and made part hereof, is a copy of a letter dated January 18, 1954, written by deponent to the debtor's stockholders, accompanying the notice of the annual meeting of stockholders called for February 10, 1954. The Court will observe that in that letter I refer to the acquisition of Stineway Drug Company and state that that purchase was part of a comprehensive plan to acquire other merchandizing establishments. I further informed the stockholders that the debtor was presented with an opportunity to acquire the Ford Hopkins Company and pointed out that the combined volume of sales of both Ford Hopkins Company and Stineway Drug Company during the fiscal year just passed totalled approximately $24,652,000.00. At the meeting of stockholders held on February 10, 1954, they approved by the requisite vote all the steps taken and to be taken specified in the notice of meeting.

(154) 13. Whatever actions the debtor has taken during the current year with respect to its operations have not only been with the full knowledge and approval of its stockholders but were performed for the best interests of stockholders. If the moving petitioner genuinely believes that management has been guilty of any alleged wrongs, he should seek redress in an appropriate stockholder's derivative action rather than jeopardize the interests of creditors and other stockholders by interfering with the orderly procedure accorded the debtor by Chapter XI to compose its general unsecured debts.

14. Long prior to the institution of the Chapter XI proceedings the debtor had begun to close a large number of its Schulte-type cigar stores because they were operating at a loss at the store level. The principal contributing causes for such losses were the high rents under burdensome leases. In the pending Chapter XI proceeding the referee has already granted the debtor's application to reject a number of these leases as burdensome and applications for like relief are pending with respect to others. Such proceedings will reduce, if not completely eliminate, the losses heretofore sustained in the operations of these stores. A dismissal of the Chapter XI proceedings or a transfer thereof to Chapter X would not only inevitably delay the rejection of these burdensome leases but would, as a result, create claims of considerable magnitude by landlords for use and occupation of the premises which would be accruing daily during the pendency of the proceedings. In the pending Chapter XI proceedings this preferred liability is being expeditiously curtailed and will shortly be entirely eliminated.

15. In addition to the foregoing, proceedings under Chapter X would endanger the debtor's interest in the

aforementioned two wholly-owned subsidiaries. The debtor values that interest at more than $2,800,000.00. All of the capital stock in (152) these two subsidiaries has been pledged to secure the payment of the two notes aggregating $2,065,000.00. Under the collateral agreement governing the pledge these notes immediately become due and payable with the consequent right of foreclosure to the holders in the event that a trustee is appointed for the debtor or the debtor files a petition for relief under any chapter of the Bankruptcy Act. The debtor has secured from the holders of the notes a commitment in effect waiving the default caused by the filing of a petition under Chapter XI. However, this commitment specifically reserves to the holders of the notes the default occurring in the event that the proceedings are changed to Chapter X and/or a trustee is appointed. Thus the valuable interest of the debtor in these two wholly-owned subsidiaries with which the future success of the debtor is inextricably connected would be placed in jeopardy with possible loss to creditors and stockholders, by resort to the wholly unnecessary proceeding under Chapter X.

16. Based upon the facts presented and the applicable law, and mindful of the equities which weigh heavily in favor of continued proceedings under Chapter XI, deponent respectfully prays that the application be denied.

(Sworn to by N. Clarkson Earl, Jr., on November 26, 1954.)

"Exhibit A", Annexed to Foregoing Affidavit.

(153)

D. A. Schulte, Inc.
380 Broadway
New York 13, N. Y.

To the Stockholders of

D. A. Schulte, Inc.

There is enclosed herewith a notice of Annual Meeting of Stockholders, Proxy and Proxy Statement, for the purpose of electing a Board of eleven Directors, amending the Certificate of Incorporation to increase the authorized capital stock of the Company from 2,315,000 shares of common stock to 3,000,000 shares, approving the sale of 300,000 shares to A. C. Allyn and Company, Incorporated, of Chicago, at $1.37½ per share of a total of $412,500, changing the name of the Company from D. A. Schulte, Inc. to General Stores Corporation and selecting certified public accountants.

On September 30, 1953, I wrote to the stockholders about our acquisition of the Stineway Drug Company in Chicago. I stated that the purchase was part of a comprehensive plan to acquire other merchandising establishments.

I also stated that the Schulte Company was continuing to effect economies of operation, but I called attention to the fact that the gross profit margin on our staple items had decreased substantially in the past few years. I also pointed out that our costs have substantially advanced during this period. It is clearly apparent, therefore, that it would be in the best interest of our Company to move decisively into profitable fields such as chain drug and variety stores rather than confine ourselves to the small tobacco type store with which we have been traditionally associated and in respect of which the prospect of profit grows ever dimmer.

"Exhibit A" Annexed to Foregoing Affidavit.

Your management was delighted, therefore, when following the acquisition of the Stineway Drug Stores, we were presented with an opportunity to acquire the Ford Hopkins Company, which operates a chain of approximately fifty-five drug stores, principally in Chicago, as well as in the States of Illinois, Indiana, Iowa and Wisconsin. The financial statements of Ford Hopkins, certified by Altschuler, Melvoin and Glasser, independent public auditors, are contained in the accompanying Proxy Statement. According to these figures, Ford Hopkins has a net worth of approximately $2,616,000, had a volume of sales during the past fiscal year of approximately $16,492,000, and its average annual net income before taxes for the past three years has been approximately $170,000 and before depreciation $414,000. Stineway, during the past fiscal year had a volume of sales of approximately $8,160,000 and its net income before taxes has averaged approximately $170,000 during the past three years, and before depreciation $265,000. The combined volume of sales of both Ford Hopkins and Stineway during the past fiscal year totalled approximately $24,652,000. Moreover, because many of the Ford Hopkins stores are located in Chicago, the operation of Ford Hopkins and Stineway under a single management will bring about economies of operation as a result of which the total earnings of the two companies should be well in excess of what they have previously been when conducted as separate enterprises.

The pending proposal for the acquisition of substantially all of the stock of Ford Hopkins calls for a total purchase price of $2,800,000, payable $735,000 upon the signing of a contract and the balance of $2,065,000 over a period of years according to a formula under which there would be paid a minimum of $200,000 a year, plus one-half of the combined net earnings of Ford Hopkins and Stineway in excess of $200,000, before provision for Federal income

Exhibit A" Annexed to Foregoing Affidavit.

taxes or depreciation but after certain deductions including any Federal income taxes actually paid during the year. The precise terms and conditions of the purchase have, of course, yet to be worked out but the foregoing represents a broad outline of the proposed transaction.

The cash resources of the Schulte Company, Stineway and Ford Hopkins, and the future earnings of the latter two companies, will be sufficient to finance the purchase (as well as to pay the balance of $420,000 due on April 15, 1954 for purchase of the Stineway stock), except for approximately $350,000, which must be raised in the form of equity capital.

In attempting to accomplish the acquisition of Ford Hopkins, which your management believes would so dramatically advance the interests of your Company, we have sought to find such equity capital. We have succeeded in working out an arrangement with A. C. Allyn and Company, Incorporated, of Chicago, Illinois under which the Allyn Company will purchase 300,000 shares of Schulte common stock at $1.37½ per share or a total of $412,500. The Allyn Company will, in turn, grant participations to a limited number of individuals, all of which is more fully set out in the enclosed Proxy Statement. The stock purchase by the Allyn Company is conditioned upon the successful conclusion of negotiations for the purchase of the Ford Hopkins stock.

For the foregoing reasons, the management believes the increase in the authorized capital stock of the Company and the approval of the proposed stock sale to the Allyn Company is highly desirable. It considers the Company fortunate in being able to attract equity capital to carry out its plan for developing the business of the Company along profitable lines.

The proposed change of name of the Company to General Stores Corporation is designated to reflect the growth of

the Company beyond the tobacco shop, which the former name symbolized, and the launching of a vigorous new enterprise in the chain drug field.

Inasmuch as the votes of two-thirds of the stockholders are required for the approval of the proposal, may we urge you to return the enclosed Proxy to us at your earliest convenience.

Sincerely yours,

N. Clarkson Earl, Jr.,
President.

January 18, 1954.

Notice of Motion for Reargument.

(163)

Sirs:

Please take notice that the undersigned will move at a term for motions of the United States District Court for the Southern District of New York to be held at Room 506 in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 15th day of February, 1955, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for the following relief:

For reargument of the motion heard, and on January 24, 1955, decided with written opinion by Judge Edward J. Dimock dismissing these proceedings unless the petition be amended so as to comply with Chapter X; and

Upon such reargument for an order denying the motion to dismiss the above entitled (164) proceedings; and

Notice of Motion for Reargument.

For such other and further relief as may be proper in the premises.

Dated: New York, New York, February 7th, 1955.

Yours, etc.,

OTTERBOURG, STEINDLER, HOUSTON & ROSEN,
Attorneys for Debtor,
Office & Post Office Address,
200 Fifth Avenue,
New York 10, New York.

To:

REICH, PELLER, GUADAGNO & CAINE, Esqs.,
Attorneys for stockholder Max Shlensky,
221 West 57th Street,
New York 19, New York.

SECURITIES AND EXCHANGE COMMISSION,
42 Broadway,
New York 4, New York.

BLUMBERG SINGER, HEPPEN & BLUMENTHAL, Esqs.,
Attorneys for Creditors' Committee,
350 Fifth Avenue,
New York, New York.

Memorandum in Support of Motion for Reargument.

(165)

STATEMENT

On October 18, 1954, General Stores Corporation filed its petition under Chapter XI and, on December 2, 1954, the motion to compel transfer of these proceedings to one under Chapter X was argued and, on January 24, 1955, decision was rendered.

It is apparent from the decision that the Court has overlooked the fact that during the interval much has transpired in the proceedings to the point where it is now clear that as a practical matter supervision is no longer necessary. More important is the fact which also appears to have been overlooked, namely that transfer of these proceedings to Chapter X would reduce the fund available to pay unsecured creditors and would probably be (166) disastrous to the interest of stockholders (Point II, page 10 herein).

Neither the statute nor the precedent relied upon by the Court constitutes any authority for the dismissal of these proceedings at this time unless the movants (the Securities and Exchange Commission and one stockholder) demonstrate affirmatively that adequate relief for the debtor in the best interests of creditors is not feasible and can not be obtained in this Chapter XI proceeding.

We feel that in following the learned dissertation by the Securities and Exchange Commission on the origin of section 77B and practice in Reorganization, this Court has overlooked the independent origin of Chapter XI for an Arrangement[1] and the extremely important amendments of 1952[2] which have advanced the law well beyond the

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[1] Section 12 of the Bankruptcy Act of 1898.

[2] Amending Sections 328 and 306(2) of the present Bankruptcy Act.

*U. S. Realty** and *Mecca Temple*** cases. The new law must affect the determination of the Court sitting now as distinguished from those Courts which sat before the Congressional amendment.

(167) Under the present law of Arrangement, stockholders are asked neither to consent to nor to forego or contribute anything. They gain by the scaling down or extension of the claims of unsecured creditors which permits the stockholders' company to reap the advantages of continuing. The business judgment of whether to continue must rest in management. This Court may not substitute its discretion for the judgment of management nor decree a transfer of this matter to Chapter X while management shows that such a transfer may well make impossible a continuance of the business. The Court has no affirmative finding to the contrary or one to the effect that a transfer to Chapter X would be in the *better* interests of stockholders since it can not be.

It now appears that the fund resulting from the liquidation of the Schulte store operation, as above referred to, being the only fund presently available for the payment of the claims of unsecured creditors, can not be dissipated by the expenses necessarily resulting from a transfer of these proceedings into Chapter X and still make a composition or Arrangement probable. There is also the very real threat that a Chapter X proceeding will result in loss of the Company's equity in the Stineway and Ford Hopkins stock.

(168) The conclusion is clear that in the best interest of stockholders as well as creditors a Chapter X proceeding is the *last thing* that should be entertained.

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* Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U. S. 434, 60 S. Ct. 1044 (1940).

** Mecca Temple, etc. v. Darrock, 142 Fed. 2nd 869 (1944).

Memorandum in Support of Motion for Reargument.

DEVELOPMENTS SINCE THE ORIGINAL ARGUMENT OF THIS MOTION.

(1)

Since the initial argument last December, General Stores Corporation has now discontinued and removed from all its Schulte type stores, and liquidated its inventory and substantially all of its fixtures and no longer employs any of its operating personnel. Management consists of the Chairman of the Board, Mr. Waddill Catchings, its President, Mr. N. Clarkson Earl, Jr. (both serving without compensation), its Vice-President, Mr. Robert E. Woods, and its Secretary and Treasurer, Mr. C. Edward Brown.

In short, the General Stores Corporation presently holds two assets, namely, cash resulting from the said liquidation of the Schulte type stores and its equity as stockholder of all of the outstanding capital stock of Stineway Drug Company and Ford Hopkins Company. In addition, and applicable only for continued operations, (469) General Stores has a valuable Tax loss carry forward, meaning a very substantial tax saving on its future operations for a period of five years.

The equity in its stockholdings is subject to the trust agreement by which the stock is pledged to secure the purchase price of the stock in the Ford Hopkins Company. Management has obtained a waiver of the default provisions of the trust agreement for a period of time while these Arrangement proceedings are pending but the other provisions of the agreement remain in effect so that transfer to a proceeding under Chapter X would constitute an automatic default and give the pledgee a right to foreclose on the collateral.

(2)

Since the original argument of this motion the Securities and Exchange Commission has been denied an application for a rehearing in *Matter of Transvision, Inc.** and has petitioned the Supreme Court for a writ of certiorari to (170) review the question of whether a corporation having a considerable number of public investors may choose between the Corporate Reorganization procedure of Chapter X and the Arrangement procedure of Chapter XI, depending upon the type of plan it proposes, or whether it is restricted to the use of Chapter X.

The petition of the Securities and Exchange Commission, filed with the Supreme Court, which refers to our pending motion, in re *General Stores Corporation*, concedes that except for the *Mecca Temple* case, the opinion of the District Court in the *Transvision* case is the first reported decision since the *U. S. Realty* case on the question of the choice between Chapter X or Chapter XI.

General Stores Corporation in trying to effect an Arrangement with its creditors so that it may concentrate upon the Stineway and Ford Hopkins operations has no desire whatsoever to be treated as a *cause celebre* but would rather have its matter disposed of in the most practical fashion.

(171) POINT I.

ONLY THE CONSENT OF CREDITORS AS PROPERLY REQUIRED IN A CHAPTER XI PROCEEDING AS IT WAS UNDER THE COMPOSITION SECTION OF THE FORMER BANKRUPTCY ACT.

(1)

The Court in its original decision on this motion, when it speaks of the "reorganization" of General Stores Cor-

**Matter of Transvision, Inc.*, Fed. 2d , decided November 9, 1954.

poration, appears to have overlooked the important distinction that no reorganization of General Stores is here being sought. General Stores proposes a composition or Arrangement with its general unsecured creditors which is relief peculiar to and adequately obtainable in the Chapter XI proceeding.

This was probably not so during that period when the so-called rule of *Northern Pacific Ry Co.* v. *Boyd*,* was being applied to the requirement in a Chapter XI proceeding that the arrangement be "fair and equitable". As the Court in the *U. S. Realty* case said:

> "The hope of securing an arrangement which is fair and equitable and in the best interests of unsecured creditors, without some readjustment of the rights of stockholders such as may be had under Chapter X, but is precluded by Chapter XI, is at best but negligible * * *". (310 U. S. at 453).

It was with the foregoing decision expressly in mind that the Congress on July 7, 1952, deleted the trouble-making language and returned (172) to the original form of the composition section of the Bankruptcy Act of 1898 providing that the Court shall confirm an Arrangement (composition) when it is satisfied that the plan is for the best interests of the creditors and is feasible.

(2)

We believe the Court has overlooked the essential distinction in the interest represented by the Securities and Exchange Commission in the *U. S. Realty* and *Mecca Temple* cases and its interest in the *Transvision* and *General Stores* cases. In both of the older cases, the Court was hard put to find what was in the best interests of unse-

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* *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482.

cured creditors because in both cases the holders of publicly distributed securities were being directly affected as general unsecured creditors in the plan of arrangement offered.

In the *U. S. Realty* case, general unsecured creditors were holders of mortgage certificates guaranteed by U. S. Realty, and in the *Mecca Temple* case they were holders of bonds constituting a debt of Mecca Temple. In both cases the question of what was in the best interests of such public creditors was something for which the Court was fully justified in seeking the aid of the Securities and Exchange Commission.

(173) In the *Transvision* and *General Stores* cases, however, the unsecured creditors do not include any members of the public holding securities of the debtor and the Securities and Exchange Commission has no claim to represent them. Since the Court by the 1952 amendment to Chapter XI is no longer concerned with the necessity for "reorganizing" the debtor (in the interests of creditors), the Securities and Exchange Commission has no compelling reason for being present in the interest of stockholders.

(3)

It seems to us that the Court has overlooked the discussion of the interrelation of the two Chapters X and XI of the Bankruptcy Act as referred to by the Court of Appeals in the *Transvision* case when it came to the conclusion that the statute "manifests a conscious purpose of Congress to encourage resort to Chapter XI whenever the remedy afforded thereby adequately protects the interests involved."

Since Congress in 1952 deleted the language "fair and equitable" which the Supreme Court said must necessarily involve publicly held corporations in a "reorganization"

whenever they sought an Arrangement or composition with their general unsecured creditors, it is not surprising (174) that the District Court and the Circuit Court in the *Transvision* case were unanimous in refusing to transfer the proceedings to Chapter X and to follow the decisions which preceded the legislative change*. We feel justified in moving for reargument since it is apparent that this important distinction, not referred to in this Court's opinion, has been overlooked.

(4)

We point out therefore that since the consent of creditors is the basic requirement of a proceeding in Chapter XI, and since the Securities and Exchange Commission has no interest on behalf of the creditors in this case, and no "reorganization" is required in this case, the Commission has no status whatsoever at this particular time to urge a dismissal merely because General Stores is publicly owned.

Congress, in amending the Bankruptcy Law in 1952 and particularly avoiding the necessity of "reorganizing" a corporation which merely seeks an Arrangement or composition with its creditors, thereby withdrew any mandate to the Securities and Exchange Commission to enter a proceeding solely because the debtor's stock was publicly held, if such a mandate had theretofore existed. The statute as amended places (175) *no* burden upon the corporate debtor to demonstrate that it ought *not* to be proceeding in Chapter X or that supervision by a Trustee was unnecessary.

On the contrary, since the corporation has proceeded for an Arrangement or composition with its unsecured creditors without the necessity of a reorganization or reshuffling of its capital structure, the burden must be upon the Se-

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* *U. S. Realty* and *Mecca Temple* cases, *supra*.

curities and Exchange Commission to demonstrate that supervision by a Trustee is necessary. In the present case no such demonstration has even been attempted.

POINT II.

A Chapter X Proceeding is Now Unnecessary and Would Probably be Disastrous.

(1)

The Court by permitting itself to be moved merely by a lack of demonstration that supervision was unnecessary has apparently overlooked the many points which affirmatively demonstrate in this case, and particularly at the present stage, not only that supervision is unnecessary but also that a transfer to Chapter X would seriously jeopardize the rights of all concerned whether they be creditors or stockholders.

(176) When Congress in 1952 manifested a more conscious purpose to encourage resort to Chapter XI in the interest of expedition, it was certainly aware of the expenses which are necessarily imposed and must be anticipated by a Chapter X proceeding. These include the compensation for services and the reimbursement of costs and expenses of the Trustee, the depositary, the reorganization manager, one or more committees of stockholders, one or more committees of creditors, and the attorneys or agents of each of them (Chapter X, Section 242).

Certainly such expenses would substantially deplete the cash fund of General Stores which is the only fund by which composition with its unsecured creditors may be effected. The only other asset is its equity in the collateral under the trust agreement.

As a practical matter also, the Court has apparently overlooked in this connection, that placing this Company

in the cumbersome Chapter X proceeding will constitute an automatic default in the trust agreement permitting the pledgee to realize upon the security. Any forced realization of the security is likely to leave little if anything to the stockholders of the Company.

(177) Since the liquidation of the Schulte type stores has been accomplished and the Company's equity in the Stineway and the Ford Hopkins chains is subject to the trust agreement, there is nothing left to be "supervised" in the present proceedings other than the ascertainment of claims and the securing of creditors consents to the composition.

The foregoing should constitute a complete demonstration that at least at this point in the proceeding, transfer of these proceedings to Chapter X and the consequent appointment of a Trustee and the intervention of a group of committees is not only unnecessary but very prejudicial to the interests of all concerned.

(2)

The Court has overlooked the fact that the debts owed to the unsecured creditors must be paid or scaled down, and to the extent that payment is extended or the debt scaled down, the interest of stockholders must necessarily be enhanced. In this case, therefore, the stockholders of General Stores are not asked to give up anything. There is no occasion here for any "blind" following by stockholders since they are not and will not in these proceedings be asked to give up or contribute anything.

(178) It seemed obvious at the initial hearing on this motion that all attorneys conceded that in an Arrangement proceeding the stockholders could not but be benefited since without the Arrangement the unsecured creditors had an absolute priority in the distribution of assets before stockholders.

It is in recognition of this reality and on no technical grounds that the consent of stockholders to the consummation of the Arrangement is not required and that the interest of the Securities and Exchange Commission in the Arrangement proceedings is only as a "stand-by" in the event reorganization or reshuffling of the capital structure may become necessary. At that time, and only at that time, might the Securities and Exchange Commission be justified in moving the case into Chapter X.

(3)

We do not argue with the Securities and Exchange Commission that they have a duty to perform in protecting the public stockholders of General Stores. In this connection, however, the Court has apparently overlooked the fact that the Securities and Exchange Commission has, (179) since November 1952, been fully informed of the operations of General Stores. The registration statement, dated November 12, 1952, has been periodically revised, the last revision being July 21, 1954. The Court is aware of the detail of balance sheets, history, operations and intentions, which are required by such registration statements.

Not only has the Securities and Exchange Commission kept itself informed by such registrations, but in addition, General Stores has kept its own stockholders informed with the important changes which have occurred in the acquisition of the Stineway and Ford Hopkins chains. On September 30, 1953, just after the Stineway chain had been acquired, Mr. N. Clarkson Earl, President of General Stores, wrote an informative letter to each of the stockholders telling them about the acquisition and why it was taking place. In accordance with Securities and Exchange Commission rules with regards to the solicitation of proxies, all of the pertinent material with regard to the acquisition of the Stineway chain and the proposed

acquisition of the Ford Hopkins chain, was mailed, with the notice of the annual meeting, to all stockholders. In soliciting (180) their proxy for the meeting of stockholders held on February 10, 1954, at which the necessary increase of the common stock of the Company and the sale of a portion of it was voted to assist in the financing of the Ford Hopkins acquisition, the Rules of the Securities and Exchange Commission required complete disclosure.

On June 30, 1954, Mr. Earl, as President, and Mr. Brown, as Secretary, sent letters to each of the stockholders reporting on the annual meeting and the actual acquisition of the Ford Hopkins chain.

One must conclude, therefore that at least since November, 1952, the stockholders of General Stores have had no reason to follow *blindly* the proposals of management in its efforts to bring a profitable operation out of the previous Schulte operation. There is no reason for the Securities and Exchange Commission to move for a transfer of these proceedings to a Chapter X proceeding on the excuse that the operations of the General Stores Corporation is one with which they are not fully familiar and for which they now somehow require the expensive aid of a trusteeship.

(184) (4)

The Securities and Exchange Commission by being permitted to intervene in these proceedings has obtained all of the practical benefits of status which it would have had under Chapter X, Section 208, and under Section 265. Having intervened there is nothing that prevents the Commission from making a report on the plan for Arrangement and composition as it would have been permitted to do under Chapter X, Section 172. That leaves only the provision of Chapter X, Section 175, requiring transmission of the Commission's report to all creditors and stock-

holders affected by the plan, which would have been done under Chapter X but for which no provision is made under Chapter XI.

Since the creditors are fully represented by an officially recognized creditors' committee in the present proceedings and by counsel, the circulation of a report by the Securities and Exchange Commission is not necessary for the benefit of creditors. Since there is contemplated no "reorganization" or "reshuffling" of the capital structure of the corporation which would affect stockholders (182) and since their consent to an arrangement or composition with general unsecured creditors is not required, a circularization of stockholders by the Securities and Exchange Commission in this proceeding would constitute unnecessary and unjustified expense.

The present situation can therefore be summarized as follows:

a. General unsecured creditors are fully represented by an official recognized creditors committee which has retained counsel and which opposes transfer of these proceedings into Chapter X as both unnecessary so far as their interest is concerned and highly prejudicial to any recovery that they may expect.

b. The Securities and Exchange Commission has been kept informed of all of the activities of this corporation since November 1953 through the filing of registration statements with the Commission from time to time. They are informed in great detail and particularly during all of the periods when the acquisition of the Stineway and Ford Hopkins chains was being considered and was actually achieved.

c. During the same period stockholders have been continuously informed through letters by the President

and Secretary and by the notice of meeting and solicitation of proxies material as approved by the Securities and Exchange Commission which has been sent to them. They have not followed management *blindly* in the various steps which have been taken to achieve a more profitable operation and the Schulte type stores.

(183) d. The Securities and Exchange Commission whose only legitimate interest in this proceeding would be on behalf of stockholders, has been permitted to intervene in this proceeding and will, of course, be given notice of all important steps taken in connection with it. That it may make an advisory report to the Court at any stage in this proceeding goes without saying. It is in a position at any time, to urge the dismissal of the present proceedings on specific facts relevant to this proceeding showing that in this proceeding an Arrangement cannot be achieved which is in the best interest of creditors and feasible.

e. So far as the orderly conduct of the proceeding is concerned, there is no necessity whatsoever for supervision since a liquidation has already occurred and all that remains is the ascertainment of claim and the accomplishment of the composition.

f. Chapter XI is adequate, therefore, and Chapter X would entail a very substantial additional expense which would seriously prejudice the rights of creditors. Creditors by their official committee have already objected to any transfer to Chapter X.

g. Finally, a transfer to Chapter X will be disastrous for stockholders for it means the automatic default under the trust agreement and the loss of the

company's equity in the stock of the Stineway and Ford Hopkins Chain. It means additional and substantial expense for trustees, committees and their respective counsel far in excess of the requirements of Chapter XI. Stockholders will be left with nothing.

(184) CONCLUSION

The problem is not a theoretical question of law but a practical application of the remedies of the Bankruptcy Act to be applied in this particular case. Of course, we deny that there is any statutory authority whatsoever for the argument of the Securities and Exchange Commission that Chapter XI is not available to a corporation whose stock is publicly held. That, however, is a matter being litigated in the Transvision case and presently before the Supreme Court of the United States.

The Court of Appeals has ruled that Chapter XI is available to a corporation with publicly held stock. We find no support in the statute for the dicta of the Court of Appeals in that case, repeating the dicta of much earlier cases, on the extent of the discretion in the District Court.

However, discretion can be applied in modification of statutory authority only upon demonstration of fact. It seems clear in the present case that the burden is upon the movants in these proceedings to demonstrate very clearly the extent to which a dismissal would be in the interests of creditors or (185) stockholders and to disprove what we have shown, namely, that a dismissal will be disastrous to both stockholders and creditors.

The liquidation of Schulte type stores has been accomplished and little is left to be done before an Arrangement or composition with the general unsecured creditors can be proposed in final form. It would seem clear that supervision of what remains to be done in these proceedings by a Trustee is totally unnecessary.

Affidavit of C. Edward Brown.

THE APPLICATION FOR REARGUMENT SHOULD BE GRANTED AND THE MOTION TO DISMISS DENIED.

Dated: New York, New York, February 7, 1955.

Respectfully submitted,

OTTERBOURG, STEINDLER, HOUSTON & ROSEN,
Attorneys for General Stores Corporation, Debtor.

Of Counsel:

AARON ROSEN,
FREDERIC P. HOUSTON,
MARKS F. PASKES.

Affidavit of C. Edward Brown, in Support of Motion for Reargument

(186)

STATE OF NEW YORK)
COUNTY OF NEW YORK)

C. EDWARD BROWN, being duly sworn, deposes and says:

1. I am the Secretary-Treasurer of General Stores Corporation and am thoroughly familiar with the pending proceedings under Chapter XI of the Bankruptcy Act.

2. Since October 18, 1954, when the petition under Chapter XI was filed, the Corporation as Debtor-in-Possession, has withdrawn from all of its Schulte type stores. It has liquidated all of its inventories and practically all its tangible assets. At the present time the only assets which it has consist of cash in bank, accounts and notes

receivable, and its equity in the capital stock of Stineway Drug Company and Ford Hopkins Company. As a going concern, General Stores Corporation also has a valuable asset of a substantial carry-forward operating loss for tax purposes.

3. In view of the fact that the Corporation has ceased being an operating company, it has substantially reduced its managing personnel. At the present time, management consists of X. Clarkson Earl, Jr., its President, serving without compensation, Waddiel Catchings, Chairman of the Board of Directors, also serving without compensation, Robert E. Woods, Vice-President, and deponent, Secretary-Treasurer.

(187) 4. The Corporation has heretofore kept its stockholders fully informed regarding the acquisition of the Stineway Drug Company and Ford Hopkins Company stock. Under date of September 30, 1953, a letter was sent to the stockholders of the Corporation by our President and I attach hereto as Exhibit "A" a copy of that letter. By that letter the President notified the stockholders that the Corporation has acquired the Stineway Drug Company, gave the purchase price for all of the capital stock, and indicated the net worth thereof.

5. In connection with the annual meeting of its stockholders held February 10, 1954, the Corporation, in accordance with the rules of the Securities & Exchange Commission, sent to its stockholders a notice of the meeting together with the proxy statement as required by those rules. A copy of the notice of that meeting and proxy statement is hereto attached, marked Exhibit "B" and made part hereof.

6. I respectfully call the attention of this Court to subdivision III on page 4 of the proxy statement wherein stockholders were informed that the company was then conducting negotiations for the purchase of substantially all of the outstanding stock of Ford Hopkins Company. In accordance with the rules of the Securities & Exchange Commission, copies of this notice, the proxy statement and reports which accompanied the same were filed with the Securities & Exchange Commission.

7. With the notice of the annual meeting and proxy statement (Exhibit "B" hereto attached), a letter dated January 18, 1954, was sent by the President of the Corporation to the stockholders and a copy of that letter is hereto attached marked Exhibit "C" and made part hereof. By that letter, the President referred to the prospective acquisition of the stock of the Ford Hopkins Company and explained the reason for that (188) purchase and the fact that the Corporation by virtue of the acquisition of both the Stineway Drug stores and the Ford Hopkins stores would be of great benefit to the future operations of the Company. That letter also explained the manner in which the Corporation would raise the necessary funds for the purpose of acquiring the Ford Hopkins stores.

8. At the meeting of stockholders held on February 10, 1954, the agreement between the Corporation and A. C. Allyn and Company, Inc. referred to in the notice of meeting and proxy statement which was the foundation for the acquisition of the Ford Hopkins Company was approved by the stockholders by requisite vote.

9. Under date of June 30, 1954, the President of the Corporation wrote to all of the stockholders advising them of the acquisition of the Ford Hopkins Company stock on

May 19, 1954. A copy of that letter of June 30, 1954, is hereto attached, marked Exhibit "D" and made part hereof.

10. It is therefore abundantly clear that all of the matters concerning which reference has been made by the moving stockholder and the Securities & Exchange Commission on their motion to dismiss these Chapter XI proceedings have, prior to the institution of these Chapter XI proceedings, been called to the attention of our stockholders and they fully approved all of the steps taken. Prior to the filing of the petition for arrangement, the Securities & Exchange Commission was likewise fully informed with respect to the activities of this Corporation.

11. What management is endeavoring to do in these Chapter XI proceedings must necessarily benefit these stockholders. Creditors of this Corporation have a prior right to its assets and to the extent that the claims of the creditors are scaled down or the payment thereof extended, the interest of stockholders must necessarily be served. There can be no (189) bona fide objection by stockholders to an extension and arrangement with creditors.

12. Negotiations are presently pending with the Creditors' Committee with reference to a proposed amended Plan of Arrangement. Under this Amended Plan of Arrangement, all of the general unsecured debts of the Corporation would be discharged by payment of a fraction thereof. It is indicated that this amended proposal may be accepted by the Committee and recommended to the creditor body. Under these circumstances, stockholders must necessarily benefit from the fact that the claims which have an interest in the assets of the Corporation ahead of stockholders are eliminated, and thus substantially improve stockholders' position. This will be accomplished

without asking stockholders to consent to or contribute anything. This is the clearest demonstration that adequate relief is being obtained in these Chapter XI proceedings.

13. It is also a convincing demonstration that the transfer of these proceedings to Chapter X would not only delay the prompt discharge of these debts but would make such an arrangement unlikely. Transfer to Chapter X will require the appointment of a Trustee, an attorney for the Trustee, one or more so-called stockholders protective committee, each with separate counsel, all eager to justify future applications for substantial fee allowances. What can be used now toward the discharge of creditor's claims will be dissipated by fees and disbursements allowed to all this wholly unnecessary personnel.

I respectfully request that the Debtor's application for reargument be granted, and upon such reargument, the motions to dismiss and to intervene be denied.

(Sworn to by C. Edward Brown, on February 18, 1955.)

Exhibit "A", Annexed to Foregoing Affidavit.

(190)

D. A. Schulte, Inc.
380 Broadway
New York 13, N. Y.

September 30, 1953

To the Stockholders of D. A. Schulte, Inc.:

You have probably read in your newspaper of the acquisition of the Stineway Drug Company by D. A. Schulte, Inc. Stineway, with its 22 drug stores and 14 franchised

Exhibit "A", Annexed to Foregoing Affidavit

Stineway System stores in metropolitan Chicago, did an annual drug, luncheonette, tobacco and liquor business in excess of eight million dollars during its last fiscal year. Stineway's earnings, after taxes, have averaged in excess of $100,000 during the past five years and its net worth is in excess of $1,400,000. The purchase price for all of the outstanding capital stock of Stineway was $1,220,320.50.

The purchase is part of an overall plan to acquire other independent non-competitive drug chains. Many industries in recent years have experienced considerable consolidation but in this field very few combinations have taken place.

Insofar as the operations of D. A. Schulte, Inc. are concerned, every effort is being made to increase sales volume to the point where profits will be realized. Although a loss will be shown for the current fiscal year, it is estimated that this loss will be lower than in previous years. Sales for the nine months ended July 31, 1953 were $12,376,265 as against sales of $13,456,666 for the same period in 1952. The estimated net loss, subject to year-end adjustments and audit, for such nine months period in 1953 is $253,310 as against $309,823 in 1952. During 1952 $50,016 of non-recurring income was realized from the sale of real estate.

We are continuing to effect economies of operation. As a result of the Steinway purchase, warehouse space has been obtained in Chicago and it is intended to utilize such space to service our Midwestern stores with a resultant decrease in overhead cost. It must be remembered that the gross profit margin on our staple items such as cigars, cigarettes, tobaccos and accessories which represent approximately 75% of the total sales has decreased from 25.59% in 1944 to 16.21% in 1953. Manufacturing costs have increased and thus the cost to us on all items is higher, but because of the highly competitive nature of our business we have been unable to sell merchandise at increases commensurate with the increase in our cost. Moreover, rents,

wages, maintenance costs, utilities and the like, have also considerably increased during this period.

Despite these great difficulties, however, your Management feels that definite progress is being made. Currently, a chain-wide contest is being held with prizes such as an automobile, a mink coat, a television set and many other awards, as a means of increasing store traffic and store volume. We are presenting a popular television program and are running substantial newspaper advertising.

If there is a Schulte or a Steinway store in your area please continue to patronize it and ask your friends to do the same. Your Directors and Management are exerting every effort to put D. A. Schulte, Inc. in the black and we trust the results will be evident in the not-too-distant future.

Cordially,

N. C. Earl, Jr.,
President.

Exhibit "B", Annexed to Foregoing Affidavit.

(191)

D. A. Schulte, Inc.

Notice of Annual Meeting of Stockholders

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* * * *

III. Amendment of Certificate of Incorporation to Increase the Authorized Common Stock of the Company from 2,315,000 Shares to 3,000,000 Shares.

The Company is presently authorized to issue 2,315,000 shares of common stock of the par value of $1 per share. On November 30, 1953 there were issued and outstanding

Exhibit "B" Annexed to Foregoing Affidavit.

2,053,922 shares. 196,078 shares are reserved for issuance pursuant to an option granted under a contract with Frederick Lewisohn which was approved at a Special Meeting of Stockholders held on October 5, 1951. 15,000 shares are reserved for issuance pursuant to an employee's restricted stock option, and 50,000 shares are reserved under the Certificate of Incorporation for issuance to officers and employees. At the present time all of the authorized 2,315,000 shares are thus either issued or reserved for issuance.

The management of the Company is presently conducting negotiations for the purchase of substantially all of the outstanding capital stock of Ford Hopkins Company, a Delaware corporation operating a chain of fifty-five drug stores in Illinois, Indiana, Iowa and Wisconsin. In order to enable the Company actually to enter into a purchase agreement, the Company needs additional cash in the form of equity capital. It proposes to sell 300,000 shares of common stock to A. C. Allyn and Company, Incorporated, all as more particularly herein set forth in item "IV" of this Proxy Statement. The Company has recently acquired all of the outstanding capital stock of Stineway Drug Company, which operates a chain of twenty-two retail drug stores, all of which are in and around Chicago, Illinois. The potential Ford Hopkins purchase and the changing business and financial conditions which characterize the present situation of the Company make it advisable that the Company have available sufficient common stock which may be used in the discretion of the Board of Directors to take advantage of this and other opportunities which may present themselves to purchase properties in the retail drug or related fields or to sell or to otherwise issue additional shares to obtain equity capital in order to take advantage of such opportunities. It is frequently neither possible nor practicable to call and hold special meetings of stockhold-

ers to provide an adequate number of authorized shares of common stock, and it is deemed in the best interests of the Company and its stockholders that an adequate amount of authorized shares be made available for such uses by the Board of Directors. The management intends to issue 300,000 shares of the newly authorized stock in connection with the transaction described in item "IV" of this Proxy Statement, if such transaction is approved by the stockholders. The Company has no present intention with respect to the future issuance of the additional 385,000 shares, or, if the transaction set forth in item "IV" of this Proxy Statement is not approved, with respect to the future issuance of the entire 685,000 shares, but the management deems it highly desirable that the Company have available this number of shares of authorized stock.

There are and will be no preemptive rights with respect to such additional 685,000 shares. If authorized, the additional shares may be issued by the Board of Directors from time to time for such consideration as they may determine without further approval of the stockholders. The issuance of additional shares of stock would, of course, affect the rights of existing stockholders to the extent that there would be outstanding a larger number of shares to participate in voting, dividends and distribution on liquidation. The Certificate of Incorporation of the Company provides that no increase shall be authorized in the common stock of the Company except upon the consent of the holders of two-thirds or more of the outstanding shares of common stock. The management recommends that the stockholders vote in favor of this proposal.

* * * *

As set forth above the management of the Company has been negotiating with Lewis J. Ruskin of Chicago, Illinois for the acquisition of substantially all of the outstanding capital stock of Ford Hopkins Company. An outline of the

Exhibit "B", Annexed to Foregoing Affidavit.

contemplated transaction is set forth in the letter to stockholders accompanying this Proxy Statement. None of the management of the Schulte Company has any interest in the Ford Hopkins Company and Mr. Ruskin has no interest in the Schulte Company. No agreement for the purchase and sale of the stock of the Ford Hopkins Company has as yet been entered into.

The management of your Company has been permitted to examine all of the appropriate financial statements of Ford Hopkins Company. Certain of the financial statements are annexed to this Proxy Statement.

It is expected that if the stockholders approve the issuance of the 300,000 shares of stock which are the subject of this proposal, agreement will be reached with Mr. Ruskin and the transaction of acquisition of the stock of the Ford Hopkins Company consummated as expeditiously as practicable. The management recommends approval of this proposal of sale to A. C. Allyn and Company, Incorporated. No stockholder approval is sought of the transaction of acquisition of substantially all of the outstanding shares of Ford Hopkins Company since the management is advised by counsel that none is required.

Exhibit "C", Annexed to Foregoing Affidavit.

(192)

D. A. Schulte, Inc.
380 Broadway
New York 13, N. Y.

To the Stockholders of

D. A. Schulte, Inc.

There is enclosed herewith a notice of Annual Meeting of Stockholders, Proxy and Proxy Statement, for the purpose of electing a Board of eleven Directors, amending the Certificate of Incorporation to increase the authorized capital stock of the Company from 2,315,000 shares of common stock to 3,000,000 shares, approving the sale of 300,000 shares to A. C. Allyn and Company, Incorporated, of Chicago, at $1.37½ per share or a total of $412,500, changing the name of the Company from D. A. Schulte, Inc. to General Stores Corporation and selecting certified public accountants.

On September 30, 1953, I wrote to the stockholders about our acquisition of the Stineway Drug Company in Chicago. I stated that the purchase was part of a comprehensive plan to acquire other merchandising establishments.

I also stated that the Schulte Company was continuing to effect economies of operation, but I called attention to the fact that the gross profit margin on our staple items had decreased substantially in the past few years. I also pointed out that our costs have substantially advanced during this period. It is clearly apparent, therefore, that it would be in the best interest of our Company to move decisively into profitable fields such as chain drug and variety stores rather than confine ourselves to the small tobacco type store with which we have been traditionally associated and in respect of which the prospect of profit grows ever dimmer.

Exhibit "C" Annexed to Foregoing Affidavit.

Your management was delighted, therefore, when following the acquisition of the Stineway Drug Stores, we were presented with an opportunity to acquire the Ford Hopkins Company, which operates a chain of approximately fifty-five drug stores, principally in Chicago, as well as in the States of Illinois, Indiana, Iowa and Wisconsin. The financial statements of Ford Hopkins, certified by Altschuler, Melvoin and Glasser, independent public auditors, are contained in the accompanying Proxy Statement. According to these figures, Ford Hopkins has a net worth of approximately $2,616,000, had a volume of sales during the past fiscal year of approximately $16,492,000, and its average annual net income before taxes for the past three years has been approximately $179,000 and before depreciation, $414,000. Stineway, during the past fiscal year had a volume of sales of approximately $8,160,000 and its net income before taxes has averaged approximately $170,000 during the past three years, and before depreciation $265,000. The combined volume of sales of both Ford Hopkins and Stineway during the past fiscal year totalled approximately $24,652,000. Moreover, because many of the Ford Hopkins stores are located in Chicago, the operation of Ford Hopkins and Stineway under a single management will bring about economies of operation as a result of which the total earnings of the two companies should be well in excess of what they have previously been when conducted as separate enterprises.

The pending proposal for the acquisition of substantially all of the stock of Ford Hopkins calls for a total purchase price of $2,800,000, payable $735,000 upon the signing of a contract and the balance of $2,065,000 over a period of years according to a formula under which there would be paid a minimum of $200,000 a year, plus one-half of the combined net earnings of Ford Hopkins and Stineway in excess of $200,000, before provision for Federal income taxes or depreciation but after certain deductions includ-

Exhibit "C", Annexed to Foregoing Affidavit:

ing any Federal income taxes actually paid during the year. The precise terms and conditions of the purchase have, of course, yet to be worked out but the foregoing represents a broad outline of the proposed transaction.

The cash resources of the Schulte Company, Stineway and Ford Hopkins, and the future earnings of the latter two companies, will be sufficient to finance the purchase (as well as to pay the balance of $420,000 due on April 15, 1954 for purchase of the Stineway stock), except for approximately $350,000, which must be raised in the form of equity capital.

In attempting to accomplish the acquisition of Ford Hopkins, which your management believes would so dramatically advance the interests of your Company, we have sought to find such equity capital. We have succeeded in working out an arrangement with A. C. Allyn and Company, Incorporated, of Chicago, Illinois under which the Allyn Company will purchase 300,000 shares of Schulte common stock at $1.37½ per share or a total of $412,500. The Allyn Company will, in turn, grant participations to a limited number of individuals, all of which is more fully set out in the enclosed Proxy Statement. The stock purchase by the Allyn Company is conditioned upon the successful conclusion of negotiations for the purchase of the Ford Hopkins stock.

For the foregoing reasons, the management believes the increase in the authorized capital stock of the Company and the approval of the proposed stock sale to the Allyn Company is highly desirable. It considers the Company fortunate in being able to attract equity capital to carry out its plan for developing the business of the Company along profitable lines.

The proposed change of name of the Company to General Stores Corporation is designed to reflect the growth of the Company beyond the tobacco shop, which the former

name symbolized, and the launching of a vigorous new enterprise in the chain drug field.

Inasmuch as the votes of two-thirds of the stockholders are required for the approval of the proposal, may we urge you to return the enclosed Proxy to us at your earliest convenience.

Sincerely yours,

N. CLARKSON EARL, JR.,
President

January 18, 1954.

Exhibit "D", Annexed to Foregoing Affidavit.

(193)

GENERAL STORES CORPORATION
(Formerly D. A. Schulte, Inc.)

FORD HOPKINS COMPANY
Drug Stores in Illinois, Indiana,
~~Iowa and Wisconsin~~

STINEWAY DRUG COMPANY
Drug Stores in Chicago

"A. SCHULTE" STORES

GENERAL STORES CORPORATION
(Formerly D. A. Schulte, Inc.)
380 Broadway
New York 13, New York

June 30, 1954

TO OUR STOCKHOLDERS:

Last September I wrote you about the acquisition of Stingway Drug Company, which operates 23 drug stores and 12 franchised Stineway System Stores in metropolitan

Exhibit "D" Annexed to Foregoing Affidavit

Chicago. I pointed out that the purchase was part of an overall plan to acquire independent non-competitive drug chains.

At our stockholders' meeting in February of this year you were acquainted with our efforts to acquire the stock of Ford Hopkins Company, which operates 48 rental drug stores and 3 restaurants, principally in Chicago as well as in other cities in Illinois and in the states of Indiana, Iowa and Wisconsin. Ford Hopkins Company is also the owner of all the stock of Sargent's Drug Store, which operates 5 pharmacies, mainly in the Chicago area.

The acquisition of the Ford Hopkins stock was consummated on May 19, 1954. The purchase price was $2,800,000, of which $735,000 was paid upon the signing of the contract of acquisition. For the balance of the purchase price the Company delivered promissory notes, payable over a period of years according to a formula which is generally based on the earnings of Ford Hopkins and Stineway, with an annual minimum payment of $200,000 beginning in 1955. As security for the balance of the purchase price, all of the stock of Ford Hopkins and Stineway was assigned to Lewis J. Ruskin, as Trustee, with power in the Trustee to vote such stock, subject to certain provisions prescribing the election of representatives of our Company as minority directors of Ford Hopkins and Stineway and the consent of our Company before certain action is taken by either Stineway or Ford Hopkins.

At the time of the Ford Hopkins acquisition, arrangements were made with Ford Hopkins and Stineway providing for servicing of these two chains by our Company for a stipulated commission. Steps have also been taken looking toward unification of the buying, warehousing and distributing operations of Stineway and Ford Hopkins, which should result in economies and increased earnings for the two companies.

Exhibit "D", Annexed to Foregoing Affidavit.

I wish that I could say an encouraging word about the business done by our Schulte-type stores. I have frequently referred in the past to the great difficulties arising from the small size of these stores and the narrow gross profit margin on their staple items, such as cigars, cigarettes, tobaccos and accessories. Under the circumstances existing, it has not been possible to stem the losses from Schulte operations. Indeed, in spite of all the efforts of our management, such losses were on the increase during the early part of this year.

In view of the situation, the Board of Directors has decided to embark upon a program of discontinuing the operation of all the Schulte-type stores. Such a program, which it is contemplated will be completed by the end of this year, presently calls for the sale of the stores wherever possible to individual operators. Your management presently estimates that the Company may sustain substantial losses in the sale of inventory and fixtures, severance pay and other factors involved in the discontinuance of the operations of all the Schulte-type stores. However, if the program is carried out as planned, it will result in the ultimate elimination of operating losses from the Schulte-type stores of our Company. If these difficulties are overcome and the emphasis of our retailing operations is shifted from cigarettes and tobacco into lines of merchandise carrying a substantially higher profit margin, that will be a cause of real gratification to all of us who are interested in the welfare of our Company.

Cordially,

N. C. EARL, Jr.,
President.

Exhibit "D", Annexed to Foregoing Affidavit.

GENERAL STORES CORPORATION
(Formerly D. A. Schulte, Inc.)
380 Broadway
New York 13, New York

June 30, 1954

TO OUR STOCKHOLDERS:

At the annual meeting of the stockholders of General Stores Corporation, held on February 10, 1954, all of the management nominees for directors were elected to serve for a term of one year. The eleven directors elected and the number of votes each received are as follows:

Name	*No. of Votes*
N. Clarkson Earl, Jr.	1,561,508
Selig S. Burrows	1,561,508
Waddill Catchings	1,561,508
Charles A. Clark, Jr.	1,561,508
Joseph B. Hall	1,561,508
Morris E. Jacobs	1,561,508
Morton Jenks	1,561,508
Joseph A. Neff	1,561,408
Arthur N. Pierson, Jr.	1,561,408
Charles F. Ross	1,561,408
Paul J. Timbal	1,561,408

Joseph W. Blumenthal, who was nominated from the floor, received 17,010 votes. All the votes were cast pursuant to the provision for cumulative voting, under which the number of shares voted is multiplied by the number of

directors to be elected, and the total may be voted for one individual or divided among a number of individuals. (Subsequent to the stockholders' meeting, the number of directors was increased from 11 to 12 and John W. Combs was elected an additional director. Some time later, Messrs. Joseph A. Neff and Morris E. Jacobs resigned as directors and were replaced by Messrs. Mortimer M. Kelly, Jr. and Robert E. Woods. Messrs. Combs, Kelly and Woods are Vice Presidents of the Company.)

The proposal to increase the authorized common stock of the Company from 2,315,000 to 3,000,000 shares and to provide for the issuance of the additional 685,000 shares in such manner as shall be determined by the Board of Directors was approved by a vote of 1,552,812 to 33,054.

The proposed agreement between the Company and A. C. Allyn and Company, Incorporated, for the sale by the Company to A. C. Allyn and Company, Incorporated of 300,000 shares of common stock of the Company at $1.37½ per share, in order to finance the purchase of the stock of Ford Hopkins Company, was approved by a vote of 1,453,822 to 37,434. (The sale of the 300,000 shares to A. C. Allyn and Company, Incorporated was not consummated, but the Board of Directors authorized the sale of up to 300,000 shares of the Company's stock to a limited number of persons for investment, at the same price of $1.37½ per share which A. C. Allyn and Company, Incorporated had agreed to pay. The acquisition of the Ford Hopkins Company stock was effected on May 19, 1954; a report concerning such acquisition is contained in the accompanying letter from the President of the Company.)

The proposal to amend the Certificate of Incorporation of the Company to change the name of the Company to General Stores Corporation was approved by a vote of 1,535,057 to 15,109.

Exhibit "D", Annexed to Foregoing Affidavit.

The appointment of S. D. Leidesdorf & Co. as auditors for the current fiscal year was approved by a vote of 1,554,650 to 6,586.

N. Clarkson Earl, Jr., President of the Company, presided at the meeting, and C. Edward Brown, Secretary of the Company, acted as secretary of the meeting. Albert W. Doyle and Howard J. Sinclair, employees of the Chemical Bank & Trust Company, acted as inspectors of election.

The President opened the meeting by making a brief statement in which he reported on the acquisition of the stock of Stineway Drug Company and the proposed acquisition of the stock of Ford Hopkins Company. The President adverted to the low profit margin in cigarettes and the desirability of the move into the chain drug business. The meeting was then thrown open to discussion.

John W. Gilbert took the floor and pointed out the desirability of giving all stockholders an opportunity to participate in offerings of the Company's stock. The President stated that with respect to future transactions the participation of stockholders, wherever practicable, would be taken into consideration.

Further questions of Mr. Gilbert dealt with the business of Stineway Drug Company and the litigation with the Smith brothers. As to the latter, counsel for the Company reported that the trial had begun a few days previously and that there was a possibility that the case would be settled. (Subsequent to the meeting, the case was settled by the payment of $16,500 to Wendell H. Smith, and $18,250 to H. Cornell Smith together with cancellation of a $10,000 note which had been issued by H. Cornell Smith in payment for 10,000 shares of the Company's stock. Wendell H. Smith had sued for $31,384.92 and H. Cornell Smith for $150,000, with interest.)

Exhibit "D", Annexed to Foregoing Affidavit.

Joseph W. Blumenthal inquired about the introduction of more high-profit merchandise in existing Schulte stores. The President pointed out that the small size of these stores presented very serious obstacles. He added that the closing of some of these stores was under active consideration. In this connection the President explained the advantages which could be derived if it were found possible to acquire additional chain drug stores.

The meeting, which had been called to order at 10 A.M., was adjourned at 12:30 P.M.

Stockholders holding 531 shares were present in person. Stockholders owning 1,559,858 shares were represented by management proxies and the holders of 1,085 shares were represented by proxies issued to other individuals.

Very respectfully,

C. EDWARD BROWN,
Secretary.

[fol. 86a] In United States Court of Appeals for the Second Circuit, October Term, 1954

Argued March 18, 1955. Decided April 14, 1955

Docket No. 23557

General Stores Corporation, Debtor-Appellant,

v.

Max Shlensky and Securities and Exchange Commission Appellees

Before: Clark, Chief Judge, Frank, Circuit Judge, and Galston, District Judge.

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, Judge.

General Stores Corporation appeals from an order dismissing its petition under Chapter XI of the Bankruptcy Act unless it files an amended petition under Chapter X of the same act. Affirmed.

Melvin Liebowitz, New York City, (Aaron Rosen, Frederic P. Houston, and Otterbourg, Steindler, Houston & Rosen, New York City, on the brief), for debtor-appellant.

A. Alan Reich, New York City (Reich, Peller, Guadagnor & Caine and Howard Shugerman, New York City, on the brief), for appellee Max Shlensky.

William H. Timbers, Gen. Counsel, Securities and Exchange Commission, Washington, D. C. (David Ferber, Spec. Counsel, and Richard V. Baudler and Ezra Weiss, Attys., Securities and Exchange Commission, Washington, D. C., on the brief), for appellee Securities and Exchange Commission.

Max Goldweber, Jamaica, N. Y. (L. J. Weinsheuker and Weinsheuker & Kenner, New York City, on the brief), for Wage Claimants.

[fol. 87a] Leon Singer, New York City (Samuel Blumberg and Blumberg, Singer, Heppen & Blumenthal, New

York City, on the brief), for Creditors of General Stores Corporation.

OPINION April 14, 1955

CRAIG, Chief Judge:

The debtor, General Stores Corporation, filed a petition under Chapter XI of the Bankruptcy Act, 11 U.S.C. § 722, for an arrangement of the debts owed to its unsecured creditors. According to its plan these creditors were to receive the full face amount of their claims over a five-year period. Max Shlensky, a stockholder, challenged the adequacy of the Chapter XI procedure through a show cause order seeking a transfer to Chapter X pursuant to the newly enacted 11 U.S.C. § 728. The Securities and Exchange Commission, being granted leave to intervene, filed a motion to similar effect. Judge Dimock granted this motion and ordered the present petition dismissed unless the debtor within forty days filed an amended petition complying with the requirements of Chapter X. We stayed this order pending our determination of the debtor corporation's appeal. On this appeal the order below is supported by the stockholder and the SEC, while reversal is sought by the debtor and representatives of the general and wage creditors.

The present corporate structure of the debtor corporation is not overly complicated. General Stores Corporation is, however, the corporation formerly known as D. A. Schulte, Inc., whose somewhat checkered financial history is referred to below. At the present time there are two main corporate assets, the cash received from liquidation of the Schulte tobacco stores which were formally the chief source of income, and stock of two wholly-owned subsidiaries, Steinway Drug Company and Ford Hopkins Company. These assets total about $5,000,000. On the other side of the ledger there are about $4,000,000 of liabilities, and a capital account of more than $2,000,000. Half of the liabilities are the unsecured debts here sought to be settled by arrangement. The other liabilities represent the unpaid purchase price of the subsidiary corporations in which the debtor has just recently invested, and these liabilities are secured by the stock of

[fol. 88]

the subsidiaries. The capital account consists of 2,322,422 outstanding shares of $1 par common stock, held by 7,000 stockholders and traded on the American Stock Exchange.

As D. A. Schulte, Inc., General Stores went through a 77B reorganization from 1938 to 1940, in which much of the old common stock turned out to be worthless. Now the new common is again partially under water, and the stockholders are justifiably concerned, for their interests are in no way protected in a Chapter XI proceeding. They fear that the change from Schulte type stores to regular drugstores may only postpone the liquidation or reorganization which may be inevitable; and they wish some assurance of a fair plan now, before the remaining assets are dissipated.

We concur in Judge Dimock's well reasoned opinion that this situation calls for the greater investigation and protection of Chapter X rather than for the informal arrangement of Chapter XI. His decision we think, makes an appropriate evaluation and analysis of the criteria set out in *Mecca Temple of Ancient Arabic Order of Nobles of Mystic Shrine v. Darrock*, 2 Cir., 142 F. 2d 869, certiorari denied 323 U.S. 784, which a majority of this panel think were rather slighted in the more recent decision of *In re Transvision, Inc.*, 2 Cir., 217 F. 2d 243, certiorari denied Feb. 28, 1955; though, as Judge Dimock points out and we discuss below, this case differs markedly from *In re Transvision, Inc., supra*. In our view a widespread stockholder interest in a corporation with such a shaky financial history as this one is in itself sufficient ground for the in-

[fol. 89a] vocation of Chapter X proceedings. Even the unsecured creditors who are urging the reinstatement of the Chapter XI petition may come to regret their decision during the interval of postponed payment, without interest, of their claims. For the present, proceedings are completely in the control of the debtor corporation on whose financial acumen and bookkeeping accuracy must rest the fairness and the feasibility of the proposed arrangement. Too great a public interest is here at stake to allow the present management of the debtor to secure court ratification of such a plan without having available to all parties the disinterested appraisal and judgment of the

Securities and Exchange Commission. It is noteworthy that a corporation of this size is one for which SEC intervention is mandatory in a Chapter X proceeding. Bankruptcy Act § 172, 11 U.S.C. § 572.

Hence this is emphatically not the small corporation in which the calculated risk of the informal Chapter XI proceedings is warranted. It does not fall into the category of tightly knit structures where the subordinate creditors and stockholders are the management of the business and where the preservation of going concern value through their continued management of the business may compensate for reduction of creditor claims without alteration of management interests. *Securities and Exchange Commission* v. *U. S. Realty & Improvement Co.*, 310 U.S. 434, 454. The criteria for choice between Chapter XI and Chapter X enunciated in that case were written into the Bankruptcy Act of the enactment of § 328, 11 U.S.C. § 728, in 1952. See 1952 U. S. Code Cong. & Adm. News 1979-1980. We are content to apply them here.

The contrast between General Stores Corporation, a multimillion dollar corporation with 7,000 stockholders whose stock is actively traded on a leading stock exchange of the country, and *In re Transvision, Inc.*, *supra*, 2 Cir. [fol. 90a] 217 F. 2d 243, 246, 247, is well pointed up by Judge Dimock, who says: "In the Transvision case the debtor had outstanding 385,000 shares of common stock and 17731/2 shares of preferred. All were in the hands of management interests except 135,000 shares of common held by 425 investors. It was not listed on any exchange. The debtor's liabilities were about $700,000 and its assets about $1,000,000." So in that case Judge Sugarman exercised his discretion in denying transfer to Chapter X, a factor emphasized in the *U. S. Realty* case, *supra*, 310 U.S. 434, 455-457, and our brothers sustained him. The inference seems clear to us that upon their reasoning, they would have sustained Judge Dimock's reasoned exercise of discretion here. We are bound to add, however, that their stress upon such criteria as the proposal of "relatively simple plans" or a "reasonable likelihood that the desired financial recovery will be effected without unduly prejudicing the rights of any interested parties" and

their suggestion that a later showing of "irregularities of management" may then lead to an order of transfer do not seem to us realistic or operable in the premises. Rather, following the *U.S. Realty* and *Mecca Temple* cases, the court must evaluate the sufficiency of the remedy for the apparent need and must do so, in order to afford any protection at all adequate, at the beginning of the proceedings and before committing steps of a contrary nature have been taken. This is the course which was taken below. Its order must therefore stand, except of course for the setting of a new date within which the debtor or its creditors may file an amended petition under Chapter X if they so choose. Our stay will remain in effect until the district court acts.

Order affirmed; action remanded.

[fol. 91a] FRANK, Circuit Judge, concurring:

I agree with all that Judge Clark says. However, while he may well not have intended to go beyond severely restricting the recent decision of this court in In re Transvision, Inc., 217 F. (2d) 243 (C. A. 2), his opinion may perhaps be read as intending to overrule it. I think it desirable, therefore, to say that I am not ready to go that far, although, had I been sitting in the panel which decided that case, I would have dissented. I would say here merely that I think the rationale of the Transvision decision should be limited to a case where the facts are in most respects similar, i. e., a case where (a) but a relatively small proportion of the securities is publicly held by a small number of investors, (b) none of the securities was listed on any exchange, (c) the assets do not exceed approximately $1,000,000, and (d) there are merely the faintest suspicions raising questions about the conduct of the management.

[fol. 92a] GIBSON, District Judge (dissenting):

I do not believe that Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U. S. 434, compels an affirmance of the order below. Rather the circumstances presented in the present proceeding are essentially, in principle, the same as are set forth in In re Transvision, Inc., 217 Fed. 2d 243. Judge Medina, in the

Transvision opinion, weighed both Securities Commission v. United States Realty Co., supra, and Mecca Temple, etc. v. Davrock, 142 Fed. 2d 869, but observed:

> "Nonetheless, the scope of the permissible inquiry into the propriety of proceeding under either chapter is not susceptible of ready definition solely in terms of the existence or non-existence of public stockholders."

Clearly herein there are presented but two classes of interests: (1) that of the stockholders; (2) that of unsecured creditors. It cannot be too strongly emphasized that neither the company itself nor its unsecured creditors seek a reorganization. A single stockholder and the Securities and Exchange Commission nevertheless intervene to thwart the plan of arrangement submitted by the corporation to its unsecured creditors which would enable those [fol. 93a] creditors to receive a full 100% payment of their claims.

What is to be effected by a plan or reorganization? What is there to reorganize?

An anomolous situation arises because if the debtor had moved in the first instance under Chapter 10, it is very doubtful whether in its petition it could have met the requirements of Section 530, Title 11 of Chapter 10. In that event it would seem that the provisions of Section 547 of Title 11, Chapter 10, would apply. That section provides that when a petition filed under Chapter 10 discloses that adequate relief could be obtained by the debtor under Chapter 11, an amendment to comply with the requirements of Chapter 11 could be made. See John Hancock Mut. Life Ins. Co. v. Casey, 141 Fed. 2d 104.

Acceptance of the plan of arrangement is on its face all that the company needs to carry on its affairs. The wage earners who fall among the unsecured creditors, and who are eager to have prompt payment, certainly will suffer delay if proceedings are had under Chapter 10.

In the motion for leave to intervene made by the Securities and Exchange Commission it is alleged that "if the proposed arrangement is confirmed and the proceedings are not dismissed, the interests of investors in this proceed- [fol. 94a] ing will be improperly affected." But there is

nothing in the record before this court which sustains that allegation.

The debtor has no funded debts by way of debentures or certificates of indebtedness of any kind—bonds, mortgages, notes or obligations of like character, sold, distributed or in the hands of the general public. So much appears in the affidavit of the president of the debtor. As I have intimated, the proposed plan of arrangement does not seek to modify in any form whatsoever the capital stock of the debtor.

The order under review, if the debtor desires to have the sanction of the Bankruptcy Act, leaves no alternative but to endeavor to comply with the requirements of Chapter 10. Failing that, it is faced with the necessity of endeavoring to settle with its creditors out of court. In doing so it runs the hazard of committing an act of bankruptcy which might enable some creditors to file a petition in ordinary bankruptcy. So liquidation of the debtor would ensue. Chapter 10, as I have stated, is essentially designed to enable a debtor to work out a plan of reorganization. Historically its immediate predecessor was Chapter 77B of the Bankruptcy Act, and that in turn followed the old equity receivership, the outstanding characteristic of which was [fol. 95a] to seek a plan of reorganization of vested and conflicting interests.

It would seem to be sound common sense to leave the management of the business to the judgment of its officers and directors. There is not the slightest suggestion of the violation of any state law. Indeed if stockholders should determine that there has been bad management or misjudgment or fraud, ample relief is possible under the corporation laws of the State of New York, the domicile of the debtor.

For the foregoing reasons I feel impelled to dissent.

[fol. 96a] In United States Court of Appeals for the Second Circuit

In the Matter of General Stores Corp., Debtor Appellant

Appeal from the United States District Court for the Southern District of New York

Judgment—April 14, 1955

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed and action remanded in accordance with the opinion of this Court.

Further ordered that the stay heretofore granted will remain in effect in accordance with the opinion of this Court until the District Court acts.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. Daniel Fusaro, Clerk.

[fol. 97a] [File endorsement omitted.]

[fol. 98a] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 99a] Supreme Court of the United States, October Term, 1955

No. 170

[Title omitted]

Order Allowing Certiorari. Filed October 10, 1955.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.